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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.8

No. ~~284~~ 28

THE GEORGIA RAILROAD AND BANKING COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES M. SMITH, CAMPBELL WALLACE AND LEANDER N. TRAMMELL, RAILROAD COMMISSIONERS OF GEORGIA, AND CLIFFORD ANDERSON, ATTORNEY GENERAL OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

SEPTEMBER 11, 1885.

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1 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of the State of Georgia, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Georgia Railroad and Banking Company, plaintiff in error, and James M. Smith, Campbell Wallace, and Leander N. Trammell, railroad commissioners of Georgia, and Clifford Anderson, attorney general of Georgia, defendants in error, wherein was drawn in question the validity of a statute of the State of Georgia on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of such its validity, a manifest error hath happened, to the great damage of the said The Georgia Railroad and Banking Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

2 Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 26th day of June, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal U. S. Circuit Court, N. D. Georgia.]

A. E. BUCK,
Clerk U. S. Circuit Court, N. Dist. of Ga.

SUPREME COURT ROOM,
ATLANTA, GA., *June* 26, 1885

The above and foregoing writ of error allowed.

JAMES JACKSON,
Chief Justice of Supreme Court of Georgia.

3 [Endorsed:] The Ga. R. R. & B'k'g Co. *vs.* Jas. M. Smith *et al.*, railroad com'rs. Writ of error. Filed in office Aug. 3, 1885. Z. D. Harrison, cl'k S. C. Ga.

4 United States of America to James M. Smith, Campbell Wallace, and Leander N. Trammell, railroad commissioners of Georgia, and Clifford Anderson, attorney general of Georgia, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States to be holden at Washington on

second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, wherein the Georgia Railroad and Banking Company is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Jackson, chief justice of the supreme court of Georgia, this 27th day of June, in the year of our Lord one thousand eight hundred and eighty-five.

JAMES JACKSON,
Chief Justice Supreme Court of Georgia.

5 [Endorsed:] Filed in office Aug. 3d, 1885. Z. D. Harrison, cl'k S. C. Ga. The Ga. R. R. & B'k'g Co. *vs.* Jas. M. Smith, *et al.*, railroad com'rs. Citation.

Service of a copy of the within citation acknowledged this 18th day of July, 1885 (not waiving any right of exception to this citation or the writ of error to which it relates, or any other exception which def'ts in error can legally take in said case).

CLIFFORD ANDERSON,
Of Counsel for Def'ts in Error.

6 STATE OF GEORGIA:

To the Honorable James Jackson, chief justice of the supreme court of Georgia:

The petition of the Georgia Railroad and Banking Company, a corporation existing under the laws of said State, respectfully sheweth—

That at the September term, 1883, of the supreme court of Georgia there came on to be heard the cause of your petitioner and William O. Wadley, as executor of William M. Wadley, deceased, plaintiffs in error, against James M. Smith, Campbell Wallace, Leander N. Trammell, railroad commissioners of Georgia, and Clifford Anderson, attorney general of Georgia, defendants in error.

That said cause had originated in a bill in equity for injunction and relief, praying that said commissioners and attorney general might be restrained from enforcing against complainants the provisions of an act of the General Assembly of said State entitled

7 "An act to provide for the regulation of railroad freight and passenger tariffs in this State, to prevent unjust discrimination and extortion in the rates charged for transportation of passengers and freights, and to prohibit railroad companies, corporations and lessees in this State, from charging other than just and reasonable rates, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto; and to appoint commissioners, and to prescribe their powers and duties in relation to the same."

That said injunction was sought on the ground that said act was null and void, so far as it was in conflict with the charter of your petitioner, inasmuch as it was an act impairing the obligation of a

contract, and therefore a violation of the first paragraph of the tenth section of the first article of the Constitution of the United States.

That said bill was filed in the superior court of Fulton
8 county, in said State, which said court by its order sustained a general demurrer to said bill and rendered a judgment sustaining the validity of the said statute as not being repugnant to the said Constitution, and dismissed the bill.

Thereupon your petitioner brought the aforesaid decision of the superior court of Fulton county to said supreme court of Georgia, which is the highest court of law and equity in said State wherein a decision could be had in said cause.

That on the 9th day of February, 1884, the said supreme court rendered its decision affirming the decision of the court below and sustaining the validity of the said statute of the State of Georgia as not being repugnant to the Constitution and laws of the United States.

Your petitioner further shows that it has been greatly damaged by the said decision, and prays your honor to allow a writ of error to the Supreme Court of the United States and the proper
9 citation thereon, to the end that the errors of such decision, if any there have been, may be duly corrected.

JOS. B. CUMMING,
A. R. LAWTON,
Petitioners' Solicitors.

10 UNITED STATES OF AMERICA, *State of Georgia:*

Know all men by these presents that we, The Georgia Railroad and Banking Company, principal, and C. H. Phinizy and J. W. Green, as sureties, are held and firmly bound unto James M. Smith, Campbell Wallace, and Leander N. Trammell, railroad commissioners of Georgia, and Clifford Anderson, attorney general of Georgia, in the sum of one thousand $\frac{00}{100}$ dollars, to be paid to said obligees or their successors in office; to which payment, well and truly to be made and done, we hereby bind ourselves and successors, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with the corporate seal of said The Georgia Railroad and Banking Company, affixed by authority of a resolution of the board of directors of that company, and with the individual seals of the sureties, and dated the 28th day of ——, 188–.

Whereas lately at a term of the supreme court of Georgia,
11 in a suit depending in said court between the said The Georgia Railroad and Banking Company, plaintiff in error, and James M. Smith, Campbell Wallace, and Leander N. Trammell, railroad commissioners of Georgia, and Clifford Anderson, attorney-general of Georgia, defendants in error, judgment was rendered against the said The Georgia Railroad and Banking Company, — having obtained a writ of error to said supreme court and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation issued to the said James M. Smith, Campbell Wallace, and Leander N. Trammell, rail-

road commissioners of Georgia, and Clifford Anderson, attorney general of Georgia, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if
12 the said Georgia Railroad and Banking Company shall prosecute said writ of error to effect and answer all damage and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE GEORGIA R. R. & G. B'K'G COMP'Y,
By C. H. PHINIZY, *President.*
C. H. PHINIZY.
J. W. GREEN. [L. S.]

Signed, sealed, and delivered in presence of—
T. H. NEWBERRY.

Attest: HENRY C. GOODRICH,
Notary Public, Richmond Co., Ga.

Personally appeared C. H. Phinizy and J. W. Green, who each for himself makes oath and says that he is surety on the within bond; that his signature thereto is his own proper handwriting, and that he is worth the amount of one thousand dollars over and above all his debts, liabilities, and contracts, and the amount
13 of homestead and personalty exemptions allowed by law.

C. H. PHINIZY.
J. W. GREEN.

Sworn to before me this 27th day of June, 1885, in Richmond Co., Ga.

HENRY C. GOODRICH,
Notary Public, Richmond Co., Ga.

The above and foregoing bond examined and approved by me this 29th day of June, 1885.

JAMES JACKSON,
Chief Justice Supreme Court of Georgia.

13½ (Index omitted.)

14 *Original Bill.*

STATE OF GEORGIA, *Fulton County:*

To the honorable George Hillyer, judge of the superior court of said county, holding and exercising jurisdiction in equity:

The bill of complaint of the Georgia Railroad and Banking Company, a corporation existing under the laws of said State, and of William O. Wadley executor of William M. Wadley, against James M. Smith, Campbell Wallace, and Leander N. Trammell, composing the railroad commission of the State of Georgia, and Clifford Anderson, at-

torney general of the State of Georgia, the official residences of said Smith, Wallace, and Trammell being in said county of Fulton, and the actual residence of said Anderson being in the county of Bibb, in said State, and of the said Smith being in the county of Muscogee, and of the said Trammell in the county of Whitfield, in said State.

Humbly complaining, show unto your honor your orators that your orator, The Georgia Railroad and Banking Company, was in-
14½ corporated by a public act of the Legislature of Georgia, assented to December 27, 1833, under the name of the Georgia railroad, with the power to construct a railroad or railroads as in said act set forth; that by an act of the Legislature of Georgia approved December 18, 1835, amendments were made to the charter of your orator, The Georgia Railroad and Banking Company, by one of which the name and style of your said orator was changed from the Georgia railroad to its present name and style, the Georgia Railroad and Banking Company; that by the twelfth section of said mentioned act it was provided as follows: The said Georgia Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandise, and produce over the railroad and railroads to be by them constructed while they see fit to exercise the exclusive right: Provided, That the charge of transportation or conveyance shall not exceed fifty cents per
15 hundred pounds on heavy articles and ten cents per cubic foot on articles of measurement for every one hundred miles, and five cents per mile for every passenger:

Provided always, That the said company may, when they see fit, rent or farm out all or any part of their said exclusive right of transportation or conveyance of persons on the railroad or railroads, with the privilege to any individual or individuals or other company and for such term as may be agreed upon, subject to the rates above mentioned.

Your orators further show that in pursuance of the authority granted in said twelfth section of the first-named act of the Legislature a certain deed of lease was made and executed between your orator, The Georgia Railroad and Banking Company, and William M. Wadley the seventh day of May, eighteen hundred and eighty-one, by which your orator, The Georgia Railroad and Banking Company, rented and farmed out to William M. Wadley its right of carriage and transportation of persons and property for a term
16 of ninety-nine years. Said deed of lease is annexed hereunto as Exhibit "A" and the usual leave of reference — thereto prayed. Your orators further show that by virtue of said first-mentioned act of the Legislature and of said deed of lease there exists at the time of filing of this bill the following legal status of your orator: Your orator, The Georgia Railroad and Banking Company, owns the right in perpituity to transport persons and property on its line of railroads and to charge fare from every passenger not exceeding five cents per mile, and freight for property at the rate not exceeding fifty cents per hundred pounds for heavy articles and ten cents per cubic foot for articles of measurement for every one hundred miles. Your orator, William O. Wadley, as executor of

William M. Wadley, at present enjoys that right and will enjoy it for the term limited in said deed of lease, unless it is sooner surrendered or forfeited. Notwithstanding said deed of lease, your orator, The Georgia Railroad and
17 Banking Company, remains liable to the public and to those whose persons and property are transported over the leased railroads for any breach or failure of duty in and about the operation and management of said railroads, and might incur, as well as your orator, William O. Wadley, as executor of William M. Wadley, the penalties hereinafter mentioned. Your orators further show that the Legislature of the State of Georgia passed an act, which was approved the 14th day of October, 1879, and is entitled "An act to provide for the regulation of railroad freight and passenger tariffs in this State," to prevent unjust discrimination and extortion in the rates charged for transportation of passengers and freight and to prohibit railroad companies, corporations, and lessees in this State from charging other than just and reasonable rates, and to furnish the same and prescribe a mode of proceedure and rules of evidence in relation thereto, and to appoint commissioners
18 and to prescribe their powers and duties in relation to the same; that in pursuance of this act a board of commissioners was constituted, designated the railroad commission, composed of three members, which three members were at first James M. Smith, Campbell Wallace, and Samuel Barnett, but are now the two first named and Leander N. Trammell; that said board have assumed and still do assume to prescribe rates of freight and passenger tariffs less than the maximum of those prescribed in the twelfth section of said charter and to make them binding on your orators. Your orators further show that they have always acquiesced in the requirements of said board, but they have from time to time hoped that the legal rights to be hereinafter stated of your orators would be recognised by said commissioners and the oppressions of your orators *cause*; but your orators show that, so far from this just expectation being realized, said commission have recently, to
19 wit, the 27th day of October, 1882, by an instrument known as circular No. 31, a copy of which, marked Exhibit B, is hereunto annexed, and the usual leave of reference prayed, prescribed rules of freight, which are far below the rates which your orators are allowed by the twelfth section of said charter to charge, wherefore your orators bring this their bill of complaint and say:

1. That said circular No. 31 is not legal and binding under paragraph one of section two of article four of the constitution of the State of Georgia; the power and authority are confined and the duty is imposed upon the General Assembly to regulate freight and passenger tariffs; and the act of Oct. 14th, 1879, is unconstitutional and void, as being an attempt to delegate legislative powers to said railroad commission.

2. Said act is unconstitutional, null, and void, because in conflict with paragraph nine, article first, of the constitution of the State of Georgia, which forbids the imposing of excessive or the in-
20 flicting of unusual punishments.

3. The charter of your orator, the Georgia Railroad and Banking Company, is a contract between the State and your said orator. By said contract your orators have the right to charge any *and of* passenger tariffs not exceeding those limited in said twelfth section of said charter. Said act of the Legislature of October 14th, 1879, and said circular No. 31, issued in pursuance of said act, forbid your orators, under heavy penalties, from charging the rates allowed by said contract.

Wherefore said act of the Legislature is, by virtue of paragraph 1, section 10 of article 1 of the Constitution of the United States, which prohibits a State from passing any law impa-ring the obligations of a contract, unconstitutional, null, and void. Your orators aver as the grounds upon which they can come into a court of equity and seek the relief hereinafter specifically prayed:

1st. That said act of October 14th, 1879, fixes a penalty of
21 not less than one thousand dollars and not more than five thousand dollars for each violation of the rules of said commission, and your orators, while believing in good faith that they are not bound to obey said rules, cannot afford, in advance of the certain and judicial ascertainment and decision of their rights, to act upon such belief, however honestly entertained, when the penalty of an honest mistake would be crushing and ruinous to your orators.

2nd. That said act of October 14th, 1879, and said rules of the commission subject your orators to a multiplicity of suits, by which your orators would be greatly harrassed, and in making good their defense to which they would be subjected to great expense.

3rd. Your orators can have no adequate relief, save by the writ of injunction restraining said commission and said attorney general as hereafter specifically prayed. Your orators pray that—

1st. Said act of October 14th, 1879, be declared to be null and void.

22 2nd. That said act be declared to be in operation against your orators.

3nd. That said commission be perpetually enjoined from prescribing rates of fare and freight over said the Georgia railroad and its branches or in any manner enforcing the provisions of said act of Oct. 14th, 1879, and specially said circular No. 31.

4. That the attorney general be restrained from instituting any suit of any sort against your orators or either of them for the purpose of enforcing the provisions of said act.

5. That your orators may have such other and further relief as the nature of the case may require and to your honor may seem meet.

To this end your orators pray not only the State's writ of injunction directed to said commissioners and said attorney general, restraining them and each of them as hereinbefore prayed, but also the writ of subpœna to be directed to each and every one of them requiring them and every one of them, on a day — be herein
23 fixed and under a penalty to be therein limited, to be and appear before your honors in this honorable court, there full,

true, and perfect answers to make to the matter herein set forth and to stand to and abide the order and decree of this honorable court.

JOS. B. CUMMINGS,
A. R. LAWTON,
Comp'ts' Solicitors.

EXHIBIT A.

Lease.

The Georgia Railroad and Banking Company to William M. Wadley, May 7, 1881.

Joseph B Cumming, attorney of the Ga. R. R. Banking Co.; Alexander R. Lawton, attorney of William M. Wadley.

24 *Lease.*

The Georgia Railroad and Banking Company to William M. Wadley.

GEORGIA:

This indenture, made this seventh day of May, anno Domini one thousand eight hundred and eighty-one, between the Georgia Railroad and Banking Company, a corporation under the laws of said State, party of the first part, and Wm. M. Wadley, of Monroe county, in said State, party of the second part, witnesseth: That the party of the first part, in conformity with the provisions of its charter and acting in this behalf in pursuance of a resolution of its board of directors, regularly convened the twelfth day of April, in the year one thousand eight hundred and eighty-one, for and in consideration of the covenants, conditions, and agreements hereinafter
25 set forth on the part of said party of the second part:

Hath rented and farmed out to said party of the second part and his assigns, and does by these presents rent and farm out to said party of the second part and his assigns, for the full term of ninety-nine years from the first day of April, one thousand eight hundred and eighty-one:

All its privileges, general and exclusive, of transporting persons, merchandise, produce, and every kind of property whats-ever which is or may become the subject of railroad transportation, over the lines of railroad owned or controlled by the party of the first part, to the full extent that the party of the first part has and enjoys or is now entitled to have and enjoy or may hereafter acquire the right to have and enjoy such privileges, and subject to all the obligations and duties imposed by its charter in this behalf upon the party of the first part.

And the party of the first part has also rented and farmed out & does by these presents rent and farm out to the party of the second part for the aforesaid term of ninety-nine years, as the means
26 of full enjoyment of the privileges hereinbefore rented and farmed out, the following property, to wit:

The Georgia railroad from Augusta to Atlanta and its branches, viz., the branch from Barnett to Washington, the branch from Camak

to Warrenton, and the branch from Union Point to Athens, with all the extensions thereof which may be made hereafter to other points.

Also the Macon and Augusta railroad from Warrenton to Macon: Together with the rights of way, road-beds, depots, stations, warehouses, elevators, workshops, wells, cisterns, water tanks, and other appurtenances of said railroad and branches.

And the party of the first part also hereby assigns to the party of the second part, so far as it can lawfully do so, any right it may have to extend any of said railroads or branches.

And the party of the first part also assigns to the party of the second part and his assigns all its rights, claim, interest, and demand in, to, and upon the Walton railroad, so that the party of the second part may have the same right touching the bonds of the
27 Walton Railroad Company that he has by virtue of these presents in reference to the bonds of the Augusta and Port Royal railway, as hereinafter provided.

And the party of the first part also assigns by these presents to the party of the second part and his assigns all the right of ownership, management, control, and use of the Western Railroad of Alabama which the party of the first part now has or is entitled to: Provided, That when either branch of the Western Railroad of Alabama from Opelika into Georgia shall be sold, one-half of the proceeds of the sales shall be received by the party of the first —.

But in consideration that the party of the second part and his assigns will thereby lose the free use of the property of the party of the first part in the branch so sold, the party of the first part will in that event pay to the party of the second part and his assigns interest on said half of the proceeds at the same rate that the then bonds of the Western Railroad of Alabama, or its successors, may bear at the date of payment of the interest of said bonds—that is to say,
28 if said bonds shall bear eight per cent. interest, that rate of interest shall be paid on one-half of the proceeds, and if said bonds bear six per cent. interest, then that rate of interest shall be paid on one-half the proceeds, and so from time to time.

The party of the first part also agrees to assign and transfer to the party of the second part and his assigns, for and during said term of ninety-nine years, the income of the stock now held by the party of the first part in the Atlanta and West Point Railroad Company, to wit, four thousand four hundred and nine shares, and in the Rome Railroad Company, to wit, fourteen hundred and eighty-nine shares and three-eight-s of a share.

Also to give to the party of the second part and his assigns an irrevocable power of attorney to vote said stocks, with the restrictions hereinafter indicated, as fully as the party of the first part might vote them if this agreement had not been made.

Also to assign and transfer to the said party of the second part and his assigns, for and during said term of ninety-nine years, the
29 income of the stock and of the bonds held by the party of the first part in the Port Royal and Augusta Railway Company, and to give to the party of the second part and his assigns an irrevocable power of attorney to vote said stocks and bonds, with the re-

striction hereinafter indicated, as fully as the party of the first part could vote them if this agreement had not been made.

But this provision is not to include the claim of the party of the first part on the Compress Company of Port Royal, its compress, elevator, and other property of said Compress Company.

And if the said bonds of the Port Royal and Augusta Railway Company should be collected at any time by the party of the first part, then the party of the first part will pay to the party of the second part and his assigns interest on said collection for and during the unexpired period of said term of ninety-nine years at the then current legal rate of interest of the State of Georgia, not exceeding six per cent. per annum.

The party of the first part also agrees to deliver to the
30 party of the second part and his assigns all steel rails which have been contracted for by the party of the first part at the expense of the party of the first part.

The party of the first part also agrees to pay the principal and interest of the bonds of the party of the first part and of the Macon and Augusta Railroad Company: Provided, That nothing herein contained shall be construed as impairing or in any way affecting the right of the party of the first part to renew any of said bonds.

And the party of the first part also agrees to pay the taxes which may be payable under the charter of the party of the first part on the rental hereinafter stipulated, or on so much thereof as may be taxable, and all taxes, if any, which may become by law collectable from the party of the first part on the shares of its stock in the hands of its shareholders; but all other taxes which may be payable on the property and franchises, *which* or the control, use, or enjoyment of
which is hereby rented, farmed out, assigned, or transferred
31 to the party of the second part and his assigns, shall be paid by the party of the second part and his assigns. This indenture is not to affect the ownership, use, and enjoyment of the party of the first part as to all the cash, notes, claims, demands, rights, and credits owned by the party of the first part on the first day of April, eighteen hundred and eighty-one.

The banking-house privileges and banking business of the party of the first part are nowise affected by this indenture.

The lands, houses, and tenements belonging to the party of the first part, other than its elevator and appurtenances in the city of Augusta, not necessary or used for railroad purposes, are not affected by this indenture, and contracts relating to such houses, lands, and tenements made before the date of these presents, although not yet executed, shall not be affected by this agreement, but may be carried out by the party of the first part. All contracts now existing between the party of the first part and other railroad companies, except as otherwise and hereinbefore provided, shall be carried out
by the party of the second part and his assigns: Provided,
32 That the party of the second part and his assigns shall have the same right to modify, change, or abrogate said contracts which the party of the first part now has.

In consideration of the things hereinbefore agreed to be done by

the party of the first part, the party of the second part hereby covenants for himself and his assigns to pay to the party of the first part the sum of six hundred thousand dollars annually for the full term of ninety-nine years in two semi-annual payments of three hundred thousand dollars each, the first of said semi-annual payments to be made on the first day of October, eighteen hundred and eighty-one, and the others on the first days of April and October thereafter, and said payments to be made in such money as is legal tender of the United States at the time of such payments.

The party of the second part also covenants for himself and his assigns to return the property hereinbefore rented, farmed out, and assigned to the party of the second part in as good condition
33 as it is now in, and unimpaired in value—that is to say, the railroads and their appurtenances as well adapted to the business of transportation as they now are, and the personal property in personal property equal in value and as well adapted to its uses as it now is; and all the property substituted for and added to that which is hereby rented and farmed out shall be the property of the party of the first part to the same extent as the original property for which it may be substituted or to which it may be added was the property of the party of the first part.

And the party of the second part also covenants for himself and his assigns to keep the railroads and their appurtenances and the means of transportation in first-class condition of such property, and also to indemnify the party of the first part against any damages, losses, or liabilities which may be incurred by reason of the operating of the railroads the use and control of which are hereby granted and farmed out.

34 The party of the second part also covenants for himself and his assigns that he and they will pay the interest demandable of the party of the first part on the bonded debt of the Western Railroad of Alabama so that said indebtedness shall never be increased, and at the termination, for any cause, of this agreement to return the property which the party of the first part has in said railroad without any greater encumbrance thereof than it now bears.

But the party of the first part will consent to the organization of the owners of the Western Railroad of Alabama into a corporation and to the issue by said corporation of bonds to renew bonds maturing from time to time for which the said railroad of Alabama is liable, which said bonds the party of the first part hereby agrees to endorse or guarantee to the same extent that it is now bound for the bonds of the Western Railroad of Alabama: Provided, That said incorporation shall not impair the beneficial ownership of
35 said railroad by the party of the first part: and

Provided further, That the aggregate amount of bonded indebtedness of said railroad and the rate of interest thereon shall not be increased to an amount and rate exceeding the present amount of bonds and present rate of interest.

The party of the second parts also covenants for himself and his assigns that the privileges of free passage to the stockholders and directors of the Georgia Railroad and Banking Company shall be

continued to the same extent as they are now enjoyed by stockholders and directors, respectively, according to the present usages of said company.

The party of the second part also covenants for himself and his assigns that he and they shall have no power to encumber, or to assist in encumbering, or to permit to be encumbered, the property or stocks passing into the control of the party of the second part by virtue of this indenture to the full extent that the said party has control, except the Western Railroad of Alabama, as hereinbefore provided, and that he and they will not for such purpose vote any of the stocks or bonds of the corporations the power of voting which is hereinbefore given, and that the irrevocable powers of attorney hereinbefore stipulated to be given may be restricted on their face in this respect.

36

Thé party of the second part also covenants for himself and his assigns that the party of the first part shall have the right to enter upon and inspect the railroads hereinbefore mentioned and appurtenances, including the rolling stock used on the same, by persons selected by the party of the first part, as often as the party of the first part may think proper.

The party of the first part reserves the right, in addition to all other remedies now usual or hereafter to become usual in the law, to enter upon and resume possession and enjoyment of all its property for the breach of any of the covenants or agreements of this indenture.

At the termination for any cause of this lease all necessary and proper betterments which shall have been made by the party of the second part or his assigns shall be paid for at their then fair value by the party of the first part:

37

Provided, always, That nothing herein contained shall be construed as giving or attempting to give to the party of the second part or his assigns the right to do or omit any act or thing the doing or omission of which would furnish a ground for forfeiture of the charter of the party of the first part, and all such acts and omissions are hereby declared to be contrary to the terms and spirit of this indenture and void.

In order to guarantee the performance of the agreements and covenants hereinbefore made by the party of the second part said party of the second part further covenants for himself and his assigns to deposit in such place and in such manner as the president of the party of the first part may designate one million dollars in bonds of the United States or in other bonds of equal value, said deposit to be kept up to the clear market value of one million dollars, provided the party of the second part and his assigns shall have the privilege of collecting for his or their own benefit the income of said bonds and of changing the kind of bonds from time to time and of substituting for bonds other and different security, provided such other and different security be first approved by the party of the first part.

38

And the party of the second part also covenants for himself and his assigns that his and their legal rights and privileges under this

indenture shall be so preserved by him that the deposit of one million dollars of security for the due and faithful performance of the terms and conditions of this indenture shall remain and continue so subject during the entire term of the lease without impediment or embarrassment growing out of distribution or want of representation of the estate of the party of the second part or of any of his assigns, and that it is the true intent and meaning of these presents that said deposit of security shall at all times remain as a guaranty for the covenants of this indenture and liable to any proceed-
39 ings at law or in equity to enforce the rights of the party of the first part without let, hindrance, or delay on account of death of the party of the second part or any of his assigns, testate or intestate, and that death of the party of the second or any of his assigns, testate or intestate, and the failure of legal representation of his or their estate for any period whatsoever shall be no excuse for the non-performance of any of the covenants or agreements of the party of the second part.

It is agreed that within sixty days from the date of these presents a full and complete inventory of all the property delivered under this agreement, showing its character, condition, and value, shall be made by two disinterested experts and annexed to this indenture as a part thereof, said inventory to be made at the joint expense of the parties of the first and second parts.

In witness whereof the party of the first part has caused its president to sign these presents and — its corporate seal the day and
40 year first above-written.

In duplicate.

THE GEORGIA R. R. AND BANKING CO.,
[CORPORATE SEAL.] By C. H. PHINIZY, *Pres't.*
WM M. WADLEY. [L. S.]

Signed, sealed, and delivered in presence of—
A. R. LAWTON.
JOS. B. CUMMING.
HENRY C. GOODRICH,
Notary Public, Richmond Co., Ga.

GEORGIA, *Richmond County:*

Recorded in clerk's office, superior court of said county, Book K K K, folios 711, 712, 713, 714, 715, and 716, May 26th, 1881.

WM. E. KEENER,
Deputy Clerk Superior Court, R. C., Ga.

41 EXHIBIT "B."

Circular No. 31.

OFFICE OF THE RAILROAD COMMISSION,
ATLANTA, GA., *October 27th*, 1882.

1. Column J (cotton) of the commissioners' standard freight tariff now in use, viz:

Distances	10	20	30	40	50	60	70	80	90	100	110	120	130	140	150	160
Class J. Cents	12	14	16	18	20	22	24	26	28	30	31	32	33	34	35	35
Distances	170	180	190	200	210	220	230	240	250	260	270	280	290	300	310	
Class J. Cents	36	36	37	37	38	38	39	39	40	40	41	41	42	43	43	
Distances	320	330	340	350	360	370	380	390	400	410	420	430	440	450	460	
Class J. Cents	43	44	44	45	45	45	47	47	47	48	48	48	49	49	49	

Is hereby repealed.

The following is adopted as the column for class J (cotton) in the commissioners' standard freight tariff:

Distances	10	20	30	40	50	60	70	80	90	100	110	120	130	140	150	160
Class J. Cents	10	12	15	17	19	21	22	23	24	25	26	27	28	29	30	31
Distances	170	180	190	200	210	220	230	240	250	260	270	280	290	300	310	
Class J. Cents	32	33	34	35	36	37	38	39	40	41	42	43	44	45	45	
Distances	320	330	340	350	360	370	380	390	400	410	420	430	440	450	460	
Class J. Cents	47	48	49	50	51	52	53	54	55	66	57	58	59	59	60	

42 The percentage now allowed certain railroads on cotton are continued in force and are applicable to the standard column J as adopted by this circular. In estimating cotton rates, when additional percentages are allowed, in cases where fractions of cents occur the nearest half cent may be used.

CAMPBELL WALLACE,
Chairman pro tem.
R. A. BACON, *Secretary.*

STATE OF GEORGIA, *Richmond County:*

You, Charles H. Phinizy, do swear that you are the president of the Georgia Railroad and Banking Company, one of the complainants in the foregoing bill; that what is contained in said bill, so far as it concerns the act and deed of said complainant, is true of your own knowledge, and what relates to the act of any other person you believe to be true.

C. H. PHINIZY.

Sworn to and subscribed before me this 23rd day of November, 1882.

F. E. FLEMING,
Not. Pub., R. Co., Ga.

STATE OF GEORGIA, *Richmond County:*

43 You, John W. Green, do swear that you are the general manager of the Georgia railroad, and that as such you are the agent and attorney-in-fact of the lessee of the Georgia railroad and its branches, and that what is contained in the foregoing bill, so far as concerns the act or deed of the lessee, is true, and that relates to the act or deed of any other person you believe to be true.

JOHN W. GREEN.

Sworn to and subscribed before me this 24th day of November, 1882.

W. T. RICHARDS,
N. P., Richmond Co.

Order to Show Cause.

AT CHAMBERS, *Nov.* 24, 1882.

Let this bill be filed in the office of the clerk of the superior court of Fulton county, and duly served with the order upon the defendants. The defendants will show cause, if any they have, before me at the court-house of Richmond county, on the 20th December next, at 10 o'clock a. m., why the writ of injunction should not issue as prayed for. In the meantime the railroad commission is
44 restrained from enforcing circular No. 31 set forth in the bill and exhibits, and the honorable the attorney general is restrain- from instituting any suit for enforcing said circular or for the disregard by the complainants of the requirements of the same. This order granted by me upon information that Judge Hillyer, of the Atlanta circuit, is disqualified in the cause.

CLAIBORNE SNEAD,
Judge Superior Court, of the Augusta Circuit.

Acknowledgment of Service.

I acknowledge due and legal service of the foregoing bill, exhibits, &c., and waive all other and further service.
Nov. 25, 1882.

JAMES M. SMITH, *Chair., &c.*

Filing of Bill.

Filed in office Nov. 25th, 1882.

C. H. STRONG, *C. S. C.*

Writ of Injunction.

STATE OF GEORGIA, *Fulton County:*

To Jas. M. Smith, Campbell Wallace, Leander N. Trammell, R. R. com's, and Clifford Anderson, attorney general of the State
45 of Georgia, their confederate servants and agents:

Whereas the Ga. R. R. and B. Co. and Wm. O. Wadley, executor, &c., have prefixed their bill of complaint against you, returnable to the spring term, eighteen hundred and eighty-three, of

the superior court of said county; and whereas the Ga. R. R. & B. Co. and Wm. O. Wadley, ex'r, &c., by their said bill pray the issuing of the State's writ of injunction to be forthwith issued to stay the railroad commission from enforcing a certain act of the Legislature of Ga. approved Oct. 14th, 1879, and specially circular No. 31 of said commission, shown as Exhibit B to said bill, and to stay the attorney general from instituting any suit against said complainants to enforce the provisions of said act, and the said Ga. R. R. & B. Co., by its president, C. H. Phinizy, and general manager, John W. Green, having verified the facts and statements of said bill on oath, and said bill having been read and sanctioned by the judge of the Augusta circuit, presiding in said court, therefore, you, the
46 said Smith, Wallace, Trammell, R. R. com's, and Anderson, att'y general, and all and every the persons before mentioned, are hereby commanded and strictly enjoined that you and every one of you do from henceforth altogether and absolutely desist from doing any of the aforesaid acts and against which an injunction is prayed in said bill until said superior court shall make further order to the contrary.

To the sheriff of the county of Fulton:

You are hereby commanded to give notice hereof to the said James M. Smith, Campbell Wallace, and L. N. Trammell, R. R. com., and Clifford Anderson, att'y gen'l, and all the persons before mentioned by leaving a true and attested copy of the foregoing writ with the said Smith, Wallace, Trammell, and Anderson and the other persons above mentioned.

Witness the Honorable Claiborne Snead, judge S. C., Aug. C., presiding in said court, this November 25th, 1882.

C. H. STRONG, *Clerk.*

Writ of Subpœna.

STATE OF GEORGIA, *Fulton County:*

47 To Jas. M. Smith, Campbell Wallace, Leander N. Trammell, R. R. com., and Clifford Anderson, att'y gen'l, of said county, Greeting:

For certain causes to us made known by the bill of complaint of the Georgia Railroad and Banking Company and Wm. O. Wadley, executor of William M. Wadley, for discovery and relief filed in the clerk's office of the superior court of said county, on the chancery side of said court, in which said Ga. R. R. & Bank. Co. & Wm. O. Wadley, exe., &c., are complainants and you, the said Smith, Wallace, & Trammell, R. R. com., and Anderson, att'y gen'l, are defendants—

We command and strictly enjoin you that, laying all other business aside and notwithstanding any excuse you have, *that* you be and appear before us, at our superior court to be held in and for said county, on the 1st Monday after the 4th Monday in March next, to answer to all such matters and things as may then and there be

objected against you, and to stand to and abide the further order and decree then and there to be made in the premises.

48 Witness the Honorable Claiborne Snead, judge S. C., A. C., presiding in said court, this November 25th, 1882.

C. H. STRONG, *Clerk.*

Service by Sheriff.

Served Clifford Anderson, att'y gen'l of Ga., personally with a copy of the within this 7th of December, 1882.

A. M. PERKERSON, *Sh'ff.*

Agreement of Counsel.

THE GA. R. R. & B. Co. *et al.*

vs.

JAMES M. SMITH *et al.*, Railroad Commission.

Bill for injunction, pending before Judge Snead on motion for injunction.

It is agreed by counsel for complainants and defendants in the above-stated case that the motion for injunction ordered to be heard by Judge Snead, at chambers, at Augusta, Georgia, at 10 o'clock a. m. December 20, 1882, be postponed until the 18th day of January, 1883, in the hope that the decision of the superior court in a similar case now pending in that court may be had by that time.

CLIFFORD ANDERSON,
Att'y Gen'l & of Counsel for Defendants.

Order Postponing Hearing Motion.

AT CHAMBER'S AT AUGUSTA, *Dec.* 20, 1882.

49 Counsel for complainants and defendants consulting, it is ordered that the hearing of the motion for injunction, which motion was set for this day, be postponed until 10 o'clock a. m. the 20th January, 1883.

On motion of complainant's counsel (defendant's counsel neither consenting nor objecting), it is further ordered that the restraining order granted November 24, 1882, be continued in force until the hearing.

CLAIBORNE SNEAD,
Judge Su. C.
C. H. STRONG, *Clerk S. C.*

Recorded Feb'y 14th, 1883.

Agreement by Counsel.

THE GEORGIA R. R. & B. Co. *et al.*

vs.

JAMES M. SMITH *et al.*, Railroad Commission.

Bill for injunction, pending before Judge Snead on motion for injunction.

It is agreed by counsel for complainants and defendants in the above-stated case that the motion for injunction ordered to be heard by Judge Snead, at Chambers, at Augusta, Ga., at 10 o'clock a. m. December 20th, 1882, be postponed until the 18th day of January, 1883, in the hope that the decision of the supreme court
50 in a similar case now pending in that court may be had by that time.

CLIFFORD ANDERSON,
Att'y General and of Counsel for Def'ts.

Demurrer.

Fulton Superior Court. Spring Term, 1883.

THE GEORGIA RAILROAD & BANKING COMPANY & WILLIAM O. WADLEY, Executor of William M. Wadley, Dec'd,
vs.
JAMES M. SMITH & Others, Railroad Commissioners, *et al.*
} No. 28.

Bill for injunction.

And now comes the respondents on the above-entitled bill and demur to said bill, and, for causes of demurrer, say—

First. That said complainants have not by their said bill made such a case as entitled *them* in a court of equity to the relief prayed for therein.

Second. That there is no equity in said bill.

Third. That complainants have a full, adequate, and complete remedy at law for the alleged grievances complained of in their said bill. Wherefore said respondents pray the judgment and
51 decree of the honorable court dismissing said bill, and that they be hence discharged with their reasonable costs.

CLIFFORD ANDERSON,
Att'y General of Georgia & Counsel for Respondents.

Acknowledgment of Service.

Due and legal service of the within demurrer acknowledged and further service and notice waived.

May 10th, 1883.

JOS. B. CUMMINGS,
Complainants' Solicitor.

Filing of Demurrer.

Filed in office May 10th, 1883.

C. H. STRONG, *C. S. C.*

Order Sustaining Demurrer.

* * * * * * *

Clerk's Certificate.

CLERK'S OFFICE,
SUPERIOR COURT OF FULTON CO.,
ATLANTA, GA., *June 9th*, 1883.

I hereby certify that the foregoing pages hereunto attached contain a true and complete transcript of the record in the case of Ga. R. R. and B'k'g Co. *et al.*, plaintiffs in error, *vs.* James M.
52 Smith *et al.*, R. R. commission, *et al.*, defendants in error, except the order sustaining demurrer.

I further certify that the spring term of said court at which said case was tried is still in session, 18—.

All of which appears from the record and minutes of said court.

Witness my signature and the seal of said court, affixed the day and year first above written.

C. H. STRONG,
Clerk Sup'r Ct., Fulton Co., Ga.

53 Supreme Court of Georgia. September Term, 1883.

THE GEORGIA RAILROAD AND BANKING COMPANY and WILLIAM O. WADLEY, Executor,

vs.

JAMES M. SMITH, CAMPBELL WALLACE, and LEANDER N. TRAMMELL, Railroad Commissioners, *et al.*

And now come the plaintiffs in error, when the case is called for a hearing in the supreme court of Georgia, and suggest a diminution of the record, as follows, to wit: The following order is omitted from the record as transmitted to this court by the clerk of the superior court of Fulton county, viz:

"THE GEORGIA RAILROAD AND BANKING COMPANY and WILLIAM O. WADLEY, Ex'or,

vs.

JAMES M. SMITH, CAMPBELL WALLACE, and LEANDER TRAMMELL, Railroad Commissioners, *et al.*

54 The defendants in the above-stated case having filed a demurrer to the above-stated bill at this the first term of the court after the filing of said bill, and the same having been this day heard in its order during said term, both parties being represented and announcing ready for said hearing:

It is ordered and adjudged that said demurrer be, and the same

is, sustained, and said bill is dismissed at the cost of complainants, the same to be taxed by the clerk of this court.

This May —, 1883.

W. R. HAMMOND,
J. S. C., F. C."

Joseph B. Cumming, counsel for plaintiff in error in the above-stated cause, being sworn, deposes and says that the diminution of the record suggested and above set forth in full is true.

JOS. B. CUMMING.

Subscribed and sworn to in open court January 24th, 1884.

55 *Bill for Injunction, &c.*

In Fulton Superior Court.

THE GEORGIA RAILROAD AND BANKING COMPANY and WILLIAM O. WADLEY, Executor, &c.,

vs.

JAMES M. SMITH, CAMPBELL WALLACE, and LEANDER N. TRAMMELL, Railroad Commissioners, *et al.*

The defendants in the above-stated case having filed a demurrer to the above-stated bill at this the first term of the court after the filing of said bill, and the same having this day been heard in its order during said term, both parties being represented and announcing ready for said hearing:

It is ordered and adjudged that said demurrer be, and the same is, sustained, and said bill is dismissed at the cost of complainants, the same to be taxed by the clerk of this court.

This May —, 1883.

W. R. HAMMOND,
J. S. C., F. C.

We agree that the foregoing is a true copy of the order made by the judge of Fulton superior court containing the demurrer
56 in the case stated, and we consent that the transcript of the record in the supreme court be amended by attaching the same as a part thereof.

This January 23rd, 1884.

CLIFFORD ANDERSON,
Att'y Gen'l of Georgia, Counsel for Def'ts.
JOSEPH B. CUMMING,
A. R. LAWTON,
Counsel for Complainants in Supreme Court.

Counsel for plaintiff in error in the above-stated case having duly suggested, on oath, a diminution of the record and it being admitted by counsel for defendant in error that said diminution exists and is correctly set forth in said suggestion, it is ordered that said admis-

sion of counsel in writing shall constitute a part of the record, and that the cause proceed to a hearing.

In open court, January 24th, 1884.

[Endorsed:] No. 33. Atlanta circuit. September term, 1883. Ga. R. R. & B'k'g Co. *et al. vs.* Jas. M. Smith *et al.*, R. R. coms., *et al.* Agreed amendment to record. Filed in office Jan'y 24th, 1884. Z. D. Harrison, C. S. C.

57 *Bill for Injunction.*

THE GEORGIA RAILROAD AND BANKING COMPANY and WILLIAM O. WADLEY, Executor of William M. Wadley,

vs.

JAMES M. SMITH, CAMPBELL WALLACE, LEANDER N. TRAMMELL, Railroad Commissioners, and CLIFFORD ANDERSON, Attorney General.

Be it remembered that heretofore, to wit, on the 24th day of November, 1882, The Georgia Railroad and Banking Company, a corporation created by and existing under the laws of said State, and William O. Wadley, as executor of William M. Wadley, a citizen of said State, presented their bill of complaint, hereinafter set forth, on the equity side of the superior court of Fulton county, to the Honorable Claiborne Snead, judge of the superior courts of the Augusta circuit—the Honorable George Hillyer, judge of said superior court, of the county of Fulton, being disqualified to preside
58 in said cause—at chambers; whereupon the said Honorable Claiborne Snead, judge as aforesaid, passed the restraining order and order to show cause hereinafter set forth.

Said bill, with exhibits and the entire endorsements thereon, is as follows, to wit:

STATE OF GEORGIA, *Fulton County:*

To the Honorable George Hillyer, judge of the superior court of said county, holding and exercising jurisdiction in equity:

The bill of complaint of The Georgia Railroad and Banking Company, a corporation existing under the laws of said State, and of William O. Wadley, executor of William M. Wadley, against James M. Smith, Campbell Wallace, and Leander N. Trammell, composing the railroad commission of the State of Georgia, and against Clifford Anderson, attorney general of the State of Georgia, the official residences of said Smith, Wallace, and Trammell being in said county of Fulton and the actual residence of said Anderson being in the county
59 of Bibb, in said State, and of the said Smith being in the county of Muscogee, and of the said Trammell in the county of Whitfield, in said State. Humbly complaining, show unto your honor your orators that your orator, The Georgia Railroad and Banking Company was incorporated by a public act of the Legislature of Georgia, assented to December 27, 1883, under the name of the Georgia Railroad, with power to construct a railroad or railroads

as in said act set forth; that by an act of the Legislature of Georgia, approved December 18, 1835, amendments were made to the charter of your orator, The Georgia Railroad and Banking Company, by one of which the name and style of your said orator was changed from the Georgia Railroad to its present name and style, the Georgia Railroad and Banking Company; that by the twelfth section of said first-mentioned act it was provided as follows: "The said Georgia Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, mer-
60 chandise, and produce over the railroad and railroads to be by them constructed while they see fit to exercise the exclusive right: Provided, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles and ten cents per cubic foot on articles of measurement for every one hundred miles, and five cents per mile for every passenger: Provided always, That the said company may when they see fit rent or farm out all or any part of their said exclusive right of transportation or conveyance of persons on the railroad or railroads, with the privilege to any individual or individuals or other company, and for such term as may be agreed upon, subject to the rates above mentioned." Your orators further show that in pursuance of the authority granted in said twelfth section of the first-named act of the Legislature a certain deed of lease was made and executed between your orator, The Georgia Railroad and Banking Company, and William M. Wadley the seventh day of May, eighteen hundred and eighty-one, by which your orator, The Georgia Railroad and
61 Banking Company, rented and farmed out to William M. Wadley its right of carriage and transportation of persons and property for a term of ninety-nine years. Said deed of lease is annexed hereunto as Exhibit "A," and the usual leave of reference thereto prayed. Your orators further show that by virtue of said first-mentioned act of the Legislature and of said deed of lease there exists at the time of the filing of this bill the following legal status of your orators: Your orator, The Georgia Railroad and Banking Company, owns the right in perpetuity to transport persons and property on its lines of railroads and to charge fare for every passenger not exceeding five cents per mile and freight for property at the rate not exceeding fifty cents per hundred pounds for heavy articles and ten cents per cubic foot for articles of measurement for every hundred miles. Your orator, William O. Wadley, as executor of William M. Wadley, at present enjoys that right and will enjoy it for the term limited in said deed of lease unless it is sooner sur-
62 rendered or forfeited. Nothwithstanding said deed of lease, your orator, The Georgia Railroad and Banking Company, remains liable to the public and to those whose persons and property are transported over the leased railroads for any breach or failure of duty in and about the operation and management of said railroads, and might incur, as well as your orator, William O. Wadley, as executor of William M. Wadley, the penalties hereinafter mentioned.

Your orators further show that the Legislature of the State of Georgia passed an act which was approved the 14th day of October, 1879, and is entitled—

"An act to provide for the regulation of railroad freight and passenger tariffs in this State, to prevent unjust discrimination and extortion in the rates charged for transportation of passenger- and freights, and to prohibit railroad companies, corporations, and lessees in this State from charging other than just and reasonable rates, and to punish the same and prescribe a mode of pro-
63 cedure and rules of evidence in relation thereto; and to appoint commissioners, and to prescribe their powers and duties in relation to the same."

That in pursuance of this act a board of commissioners was constituted, designated the railroad commission, composed of three members, which three members were at first James M. Smith, Campbell Wallace, and Samuel Barnett, but are now the two first named and Leander H. Trammell.

That said board have assumed and still do assume to prescribe rates of freight and passenger tariffs less than the maximum of those prescribed in the twelfth section of said charter and to make them binding on your orators.

Your orators further show that they have always acquiesced in the requirements of said board, but they have from time to time hoped that the legal rights to be hereinafter stated of your orators would be recognized by said commission and the oppression of your orators cease; but your orators show that, so far from this just expectation being realised, said commission has recently, to wit, the 27th day of October, 1882, by an instrument known as cir-
64 cular No. 31, a copy of which, marked Exhibit "B," is hereunto annexed and the usual leave of reference prayed, prescribed rates of freight which are far below the rates which your orators are allowed by the twelfth section of said charter to charge.

Wherefore your orators bring this their bill of complaint and say—

1. That said circular No. 31 is not legal and binding. Under paragraph one of section two of article four of the constitution of the State of Georgia the power and authority are conferred and the duty is imposed upon the General Assembly to regulate freight and passenger tariffs, and the act of October 14, 1879, is unconstitutional and void as being an attempt to delegate legislative powers to said railroad commission.

2. Said act is unconstitutional, null, and void because in conflict with paragraph nine, article first, of the constitution of the State of Georgia, which forbids the imposing of excessive fines or the inflicting of unusual punishments.

3. The charter of your orator, The Georgia Railroad and
65 Banking Company, is a contract between the State and your said orator. By said contract your orators have the right to charge any rates of freight and of passenger tariffs not exceeding those limited in said twelfth section of said charter. Said act of the Legislature of October 14, 1879, and said circular No. 31 issued in

pursuance of said act forbid your orators under heavy penalties from charging the rates allowed by said contract. Wherefore said act of the Legislature is, by virtue of paragraph 1, section 10 of article 1 of the Constitution of the United States, which prohibits a State from passing any law impairing the obligations of a contract, unconstitutional, null, and void.

Your orators aver as the grounds upon which they can come into a court of equity and seek the relief hereinafter specifically prayed: 1st. That said act of October 14, 1879, fixes a penalty of not less than one thousand dollars and not more than five thousand dollars for each violation of the rules of said commission, and your orators, while believing in good faith that they are not bound to obey
66 said rules, cannot afford in advance of the certain and judicial ascertainment and decision of their rights to act upon such belief, however honestly entertained, when the penalty of an honest mistake would be crushing and ruinous to your orators. 2nd. That said act of October 14, 1879, and said rules of the commission subject your orators to a multiplicity of suits, by which your orators would be greatly harassed and in making good their defense to which they would be subjected to great expense. 3rd. Your orators can have no adequate relief save by the writ of injunction, restraining said commission and said attorney general as hereafter specifically prayed.

Your orators pray that: 1. Said act of October 14, 1879, be declared to be null and void. 2. That said act be declared to be inoperative against your orators. 3. That said commission be perpetually enjoined from prescribing rates of fare and freight over said The Georgia railroad and its branches or in any manner en-
67 forcing the provisions of said act of October 14, 1879, and especially said circular No. 31.

4. That the attorney general be restrained from instituting any suit of any sort against your orators or either of them for the purpose of enforcing the provisions of said act.

5. That your orators may have such other and further relief as the nature of the case may require and to your honor may seem meet.

To this end your orators pray not only the State's writ of injunction directed to said commissioners and said attorney general, restraining them and each of them as heretofore prayed, but also the writ of subpœna to be directed to each and every one of them, requiring them and every one of them, on a day to be therein fixed and under a penalty to be therein limited, to be and appear before your honor in this honorable court, there full, true, and perfect answers to make to the matters herein set forth, and to stand to and abide the order and decree of this honorable court.

JOS. B. CUMMING,
68 A. R. LAWTON,
Complainants' Solicitors.

EXHIBIT "A."

Lease.

The Georgia Railroad and Banking Company to William M. Wadley, May 7, 1881.

Joseph B. Cumming, attorney Ga. R. R. and Banking Company; Alexander R. Lawton, attorney of William M. Wadley.

Lease.

The Georgia Railroad and Banking Company to William M. Wadley, Georgia.

This indenture, made this seventh day of May, anno Domini one thousand eight hundred and eighty-one, between the Georgia Railroad and Banking Company, a corporation under the laws of said State, party of the first part, and Wm. M. Wadley, of Monroe county, in said State, party of the second part, witnesseth: That the party of the first part, in conformity with the provisions of its
69 charter and acting in this behalf in pursuance of a resolution of its board of directors regularly convened the twelfth day of April, in the year one thousand eight hundred and eighty-one, for and in consideration of the covenants, conditions, and agreements hereinafter set forth on the part of said party of the second part, hath rented and farmed out to said party of the second part and his assigns, and does by these presents rent and farm out to said party of the second part and his assigns, for the full term of ninety-nine years from the first day of April one thousand eight hundred and eighty-one, all its privileges, general and exclusive, of transporting persons, merchandise, produce, and every kind of property whatsoever which is or may become the subject of railroad transportation over the lines of railroad owned or controlled by the party of the first part to the full extent that the party of the first part has and enjoys, or is now entitled to have and enjoy or may hereafter acquire the right to have and enjoy, such privileges, and subject to all
70 the obligations and duties imposed by its charter in this behalf upon the party of the first part.

And the party of the first part has also rented and farmed out, and does by these presents rent and farm out, to the party of the second part for the aforesaid term of ninety-nine years, as the means of full enjoyment of the privileges hereinbefore rented and farmed out, the following property, to wit:

The Georgia railroad from Augusta to Atlanta and its branches, viz., the branch from Barnett to Washington; the branch from Camak to Warrenton, and the branch from Union Point to Athens, with all the extentions thereof which may be made hereafter to other points; also the Macon and Augusta railroad from Warrenton to Macon, together with the rights of way, road-beds, depots, stations, warehouses, elevators, workshops, wells, cisterns, water tanks, and other appurtenances of said railroad and branches.

And the party of the first part also hereby assigns to the party of the second part, so far as it can lawfully do so, any right
71 it may have to extend any of said railroads or branches.

And the party of the first part also assigns to the party of the second part and his assigns all its right, claim, interest, and demand in, to, and upon the Walton railroad, so that the party of the second part may have the same right touching the bonds of the Walton Railroad Company that he has by virtue of these presents in reference to the bonds of the Augusta and Port Royal railway, as hereinafter provided.

And the party of the first part also assigns by these presents to the party of the second party and his assigns all the right of ownership, management, control, and use of the Western Railroad of Alabama which the party of the first part now has or is entitled to: Provided, That when either branch of the Western railroad of Alabama from Opelika into Georgia shall be sold one-half of the proceeds of the sales shall be received by the party of the first part.

But in consideration that the party of the second part and his assigns will thereby lose the free use of the property of the party
72 of the first part in the branch so sold the party of the first part will in that event pay to the party of the second part and his assigns interest on said half of the proceeds at the same rate that the then bonds of the Western Railroad of Alabama or its successor may bear at the date of payment of the interest of said bonds—that is to say, if said bonds shall bear eight per cent. interest that rate of interest shall be paid on one-half of the proceeds, and if said bonds bear six per cent. interest, then that rate of interest shall be paid on one-half of proceeds, and so from time to time.

The party of the first part also agrees to assign and transfer to the party of the second part and his assigns, for and during said term of ninety-nine years, the income of the stock now held by the party of the first part in the Atlanta and West Point Railroad Company, to wit, four thousand four hundred and nine shares, and in the Rome Railroad Company, to wit, fourteen hundred and eighty-nine shares and three-eight-s of a share.

73 Also to give to the party of the second part and his assigns an irrevocable power of attorney to vote said stocks, with the restrictions hereinafter indicated, as fully as the party of the first part might vote them if this agreement had not been made.

Also to assign and transfer to the said party of the second part and his assigns, for and during said term of ninety-nine years, the income of the stock and of the bonds held by the party of the first part in the Port Royal and Augusta Railway Company, and to give to the party of the second part and his assigns an irrevocable power of attorney to vote said stocks and bonds, with the restriction hereinafter indicated, as fully as the party of the first part could vote them if this agreement had not been made.

But this provision is not to include the claim of the party of the first part on the Compress Company of Port Royal, its compress, elevator, and other property of said compress company.

And if the said bonds of the Port Royal and Augusta Rail-
74 way Company should be collected at any time by the party of the first part, then the party of the first part will pay to the party of the second part and his assigns interest on said collection for and during the unexpired period of said term of ninety-nine years at the then current legal rate of interest of the State of Georgia, not exceeding six per cent. per annum.

The party of the first part also agrees to deliver to the party of the second part and his assigns all steel rails which have been contracted for by the party of the first part at the expense of the party of the first part.

The party of the first part also agrees to pay the principal and interest of the bonds of the party of the. first part and the Macon and Augusta Railroad Company: Provided, That nothing herein contained shall be construed as impairing or in any way affecting the right of the party of the first part to renew any of said bonds.

And the party of the first part also agrees to pay the taxes which may be payable under the charter of the party of the first part on the rental hereinafter stipulated, or on so much thereof as
75 may be taxable, and all taxes, if any, which may become by law collectable from the party of the first part on the shares of its stock in the hands of its shareholders; but all other taxes which may be payable on the property and franchises which, or the control, use, or enjoyment of which, is hereby rented, farmed out, assigned, or transfer-ed to the party of the second part and his assigns shall be paid by the party of the second part and his assigns.

This indenture is not to affect the ownership, use, and enjoyment of the party of the first part as to all the cash, notes, claims, demands, rights, and credits owned by the party of the first part on the first day of April, eighteen hundred and eighty-one.

The banking-house, banking privileges, and banking business of the party of the first part are nowise affected by this indenture.

The lands, houses, and tenements belonging to the party of the first part other than its elevator and appurtenances in the city of Augusta not necessary or used for railroad purposes are not affected by this indenture, and contracts relating to such houses, lands,
76 and tenements made before the date of these presents, although not yet executed, shall not be affected by this agreement, but may be carried out by the party of the first part.

All contracts now existing between the party of the first part and other railroad companies, except as otherwise and hereinbefore provided, shall be carried out by the party of the second part and his assigns: Provided, That the party of the second part and his assigns shall have the same right to modify, change, or abrogate said contracts which the party of the first part now has.

In consideration of the things hereinbefore agreed to be done by the party of the first part the party of the second part hereby covenants for himself and his assigns to pay to the party of the first part the sum of six hundred thousand dollars annually for the full term of ninety-nine years in two semi-annual payments of three hundred thousand dollars each, the first of said semi-annual payments to be

And the party of the first part also hereby assigns to the party of the second part, so far as it can lawfully do so, any right
71 it may have to extend any of said railroads or branches.

And the party of the first part also assigns to the party of the second part and his assigns all its right, claim, interest, and demand in, to, and upon the Walton railroad, so that the party of the second part may have the same right touching the bonds of the Walton Railroad Company that he has by virtue of these presents in reference to the bonds of the Augusta and Port Royal railway, as hereinafter provided.

And the party of the first part also assigns by these presents to the party of the second party and his assigns all the right of ownership, management, control, and use of the Western Railroad of Alabama which the party of the first part now has or is entitled to: Provided, That when either branch of the Western railroad of Alabama from Opelika into Georgia shall be sold one-half of the proceeds of the sales shall be received by the party of the first part.

But in consideration that the party of the second part and his assigns will thereby lose the free use of the property of the party
72 of the first part in the branch so sold the party of the first part will in that event pay to the party of the second part and his assigns interest on said half of the proceeds at the same rate that the then bonds of the Western Railroad of Alabama or its successor may bear at the date of payment of the interest of said bonds—that is to say, if said bonds shall bear eight per cent. interest that rate of interest shall be paid on one-half of the proceeds, and if said bonds bear six per cent. interest, then that rate of interest shall be paid on one-half of proceeds, and so from time to time.

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Also to assign and transfer to the said party of the second part and his assigns, for and during said term of ninety-nine years, the income of the stock and of the bonds held by the party of the first part in the Port Royal and Augusta Railway Company, and to give to the party of the second part and his assigns an irrevocable power of attorney to vote said stocks and bonds, with the restriction hereinafter indicated, as fully as the party of the first part could vote them if this agreement had not been made.

But this provision is not to include the claim of the party of the first part on the Compress Company of Port Royal, its compress, elevator, and other property of said compress company.

And if the said bonds of the Port Royal and Augusta Rail-
74 way Company should be collected at any time by the party of the first part, then the party of the first part will pay to the party of the second part and his assigns interest on said collection for and during the unexpired period of said term of ninety-nine years at the then current legal rate of interest of the State of Georgia, not exceeding six per cent. per annum.

The party of the first part also agrees to deliver to the party of the second part and his assigns all steel rails which have been contracted for by the party of the first part at the expense of the party of the first part.

The party of the first part also agrees to pay the principal and interest of the bonds of the party of the first part and the Macon and Augusta Railroad Company: Provided, That nothing herein contained shall be construed as impairing or in any way affecting the right of the party of the first part to renew any of said bonds.

And the party of the first part also agrees to pay the taxes which may be payable under the charter of the party of the first part on the rental hereinafter stipulated, or on so much thereof as
75 may be taxable, and all taxes, if any, which may become by law collectable from the party of the first part on the shares of its stock in the hands of its shareholders; but all other taxes which may be payable on the property and franchises which, or the control, use, or enjoyment of which, is hereby rented, farmed out, assigned, or transfer-ed to the party of the second part and his assigns shall be paid by the party of the second part and his assigns.

This indenture is not to affect the ownership, use, and enjoyment of the party of the first part as to all the cash, notes, claims, demands, rights, and credits owned by the party of the first part on the first day of April, eighteen hundred and eighty-one.

The banking-house, banking privileges, and banking business of the party of the first part are nowise affected by this indenture.

The lands, houses, and tenements belonging to the party of the first part other than its elevator and appurtenances in the city of Augusta not necessary or used for railroad purposes are not affected by this indenture, and contracts relating to such houses, lands,
76 and tenements made before the date of these presents, although not yet executed, shall not be affected by this agreement, but may be carried out by the party of the first part.

All contracts now existing between the party of the first part and other railroad companies, except as otherwise and hereinbefore provided, shall be carried out by the party of the second part and his assigns: Provided, That the party of the second part and his assigns shall have the same right to modify, change, or abrogate said contracts which the party of the first part now has.

In consideration of the things hereinbefore agreed to be done by the party of the first part the party of the second part hereby covenants for himself and his assigns to pay to the party of the first part the sum of six hundred thousand dollars annually for the full term of ninety-nine years in two semi-annual payments of three hundred thousand dollars each, the first of said semi-annual payments to be

made on the first day of October, eighteen hundred and eighty-one, and the others on the first days of April and October there-
77 after, and said payments to be made in such money as is legal tender of the United States at the times of such payment.

The party of the second part also covenants for himself and his assigns to return the property hereinbefore rented, farmed out, and assigned to the party of the second part in as good condition as it is now in and unimpaired in value—that is to say, the railroads and their appurtenances as well adapted to the business of transportation as they now are, and the personal property in personal property equal in value and as well adapted to its uses as it now is, and all the property substituted for and added to that which is hereby rented and farmed out shall be the property of the party of the first part to the same extent as the original property for which it may be substituted or to which it may be added was the property of the party of the first part.

And the party of the second part also covenants for himself and his assigns to keep the railroads and their appurtenances and the means of transportation in first-class condition of such prop-
78 erty, and also to indemnify the party of the first part against any damages, losses, or liabilities which may be incurred by reason of the operating of the railroads the use and control of which are hereby granted and farmed out.

The party of the second part also covenants for himself and his assigns that he and they will pay the interest demandable of the party of the first part on the bonded debt of the Western Railroad of Alabama so that said indebtedness shall never be increased, and at the termination for any cause of this agreement to return the property which the party of the first part has in said railroad without any greater encumbrance thereof than it now bears.

But the party of the first part will consent to the organization of the owners of the Western Railroad of Alabama into a corporation and to the issue by said corporation of bonds to renew bonds maturing from time to time for which the said railroad of Alabama is liable, which said bonds the party of the first part hereby agrees to endorse or guarantee to the same extent that it is now bound for the bonds of the Western Railroad of Alabama: Provided,
79 That said incorporation shall not impair the beneficial ownership of said railroad by the party of the first part: and

Provided further, That the aggregate amount of bonded indebtedness of said railroad and the rate of interest thereon shall not be increased to an amount and rate exceeding the present amount of bonds and present rate of interest.

The party of the second part also covenants for himself and his assigns that the privileges of free passage to the stockholders and directors of the Georgia Railroad and Banking Company shall be continued to the same extent as they now enjoyed by stockholders and directors, respectively, according to the present usages of said company.

The party of the second part also covenants for himself and his assigns that he and they shall have no power to encumber or to as-

sist in encumbering or permit to be cumbered the property or stocks passing into the control of the party of the second part by virtue of this indenture to the full extent that the said party has con-
80 trol, except the Western Railroad of Alabama as hereinbefore provided, and that he and they will not for such purpose vote any of the stocks or bonds of the corporations the power of voting which is hereinbefore given, and that the irrevocable powers of attorney hereinbefore stipulated to be given may be restricted on their face in this respect.

The party of the second part also covenants for himself and his assigns that the party of the first part shall have the right to enter upon and inspect the railroads hereinbefore mentioned and appurtenances, including the rolling stock used on the same, by persons selected by the party of the first part as often as the party of the first part may think proper.

The party of the first part reserves the right, in addition to all other remedies new usual or hereafter to become usual in the law, to enter upon and resume possession and enjoyment of all its property for the breach of any of the covenants or agreements of this indenture.

At the termination for any cause of this lease all necessary
81 and proper betterments which shall have been made by the party of the second part or his assigns shall be paid for at their then fair value by the party of the first part:

Provided always, That nothing herein contained shall be construed as giving or attempting to give to the party of the second part or his assigns the right to do or omit any act or thing the doing or omission of which would furnish a ground for forfeiture of the charter of the party of the first part, and all such acts and omissions are hereby declared to be contrary to the terms and spirit of this indenture, and void.

In order to guarantee the performance of the agreements and covenants hereinbefore made by the party of the second part said party of the second part further covenants for himself and his assigns to deposit, in such place and in such manner as the president of the party of the first part may designate, one million dollars in bonds of the United States or in other bonds of equal value, said deposit to be kept up to the clear market value of one million dollars,
82 provided the party of the second part and his assigns shall have the privilege of collecting for his or their own benefit the income of said bonds and of changing the kind of bonds from time to time and of substituting for bonds other and different security, provided such other and different security be first approved by the party of the first part.

And the party of the second part also covenants for himself and his assigns that his and their legal rights and privileges under this indenture shall be so preserved by him that the deposit of one million dollars of security for the due and faithful performance of the terms and conditions of this indenture shall remain and continue so subject during the entire term of the lease without impediment or embarrassment growing out of distribution or want of representation

of the estate of the party of the second part or of any of his assigns, and that it is the true intent and meaning of these presents that said deposit of security shall at all times remain as a guaranty for the covenants of this indenture and liable to any proceedings at law or in equity to enforce the rights of the party of the first part
83 without let, hindrance, or delay on account of the death of the party of the second part or any of his assigns, testate or intestate, and that death of the party of the second part or any of his assigns, testate or intestate, and the failure of legal representation of his or their estate for any period whatsoever shall be no excuse for the non-performance of any of the covenants or agreements of the party of the second part.

It is agreed that within sixty days from the date of these presents a full and complete inventory of all the property delivered under this agreement, showing its character, condition, and value, shall be made by two disinterested experts and annexed to this indenture as a part thereof, said inventory to be made at the joint expense of the parties of the first and second parts.

In witness whereof the party of the first part has caused its president to sign these presents and its corporate seal to be affixed hereunto, and the party of the second part has hereunto set his hand and seal the day and year first above written.

84 In duplicate.

[CORPORATE SEAL.] THE GEORGIA R. R. AND BANKING CO.,
By C. H. PHINIZY, *Pres't.*
WM. M. WADLEY. [L. S.]

Signed, sealed, and delivered in presence of—
A. R. LAWTON,
JOS. B. CUMMING.

HENRY C. GOODRICH,
Notary Public, Richmond Co., Ga.

GEORGIA, *Richmond County:*

Recorded in clerk's office, superior court of said county, Book K K K, folios 711, 712, 713, 714, 715, and 716, May 26th, 1881.

WM. E. KEENER,
Deputy Clerk Superior Court, R. C., Ga.

85 EXHIBIT "B."

Circular No. 31.

OFFICE OF THE RAILROAD COMMISSION,
ATLANTA, GA., *October 27th*, 1882.

1. Column J (cotton) of the commissioners' standard freight tariff now in use, viz:

Distances	10	20	30	40	50	60	70	80	90	100	110	120	130	140	150	160
Class J. Cents	12	14	16	18	20	22	24	26	28	30	31	32	33	34	35	35
Distances	170	180	190	200	210	220	230	240	250	260	270	280	290	300	310	
Class J. Cents	36	36	37	37	38	38	39	39	40	40	41	41	42	42	43	
Distances	320	330	340	350	360	370	380	390	400	410	420	430	440	450	460	
Class J. Cents	43	44	44	45	45	45	47	47	47	48	48	48	49	49	49	

Is hereby repealed.

2. The following is adopted as the column for class J (cotton) in the commissioners' standard freight tariff:

Distances	10	20	30	40	50	60	70	80	90	100	110	120	130	140	150	160
Class J. Cents	10	12	15	17	19	21	22	23	24	25	26	27	28	29	30	31
Distances	170	180	190	200	210	220	230	240	250	260	270	280	290	300	310	
Class J. Cents	32	33	34	35	36	37	38	39	40	41	42	43	44	45	45	
Distances	320	330	340	350	360	370	380	390	400	410	420	430	440	450	460	
Class J. Cents	47	48	49	50	51	52	53	54	55	56	57	58	59	59	60	

The percentages now allowed certain railroads on cotton are continued in force and are applicable to the standard column J as adopted by this circular. In estimating cotton rates, where additional percentages are allowed, in cases where fractions of cents occur the nearest half cent may be used.

CAMPBELL WALLACE,
Chairman pro tem.
R. A. BACON, *Secretary.*

86 STATE OF GEORGIA, *Richmond County:*

You, Charles H. Phinizy, do swear that you are the president of the Georgia Railroad and Banking Company, one of the complainants in the foregoing bill; that what is contained in said bill, so far as it concerns the act and deed of said complainant, is true, of your own knowledge, and what relates to the act of any other person you believe to be true.

C. H. PHINIZY.

Sworn to and subscribed before me this 23d day of November, 1882.

F. E. FLEMING,
Not. Pub., R. Co., Ga.

STATE OF GEORGIA, *Richmond County:*

You, John W. Green, do swear that you are the general manager of the Georgia railroad, and that as such you are the agent and attorney-in-fact of the lessee of the Georgia railroad and its branches, and that what is contained in the foregoing bill, so far as concerns the act or deed of the lessee, is true, and that what relates to
87 the act or deed of any other person you believe to be true.

JOHN W. GREEN.

Sworn to and subscribed before me this 24th day of Nov., 1882.

W. T. RICHARDS,
N. P., Richmond Co.

AT CHAMBERS, *Nov.* 24, 1882.

Let this bill be filed in the office of the clerk of the superior court of Fulton county and duly served, with the order, upon the defendants. The defendants will show cause, if any they have, before me, at the court-house of Richmond county, on the 20th December next, at 10 o'clock a. m., why the writ of injunction should not issue as prayed for. In the meantime the railroad commission is restrained from enforcing circular No. 31, set forth in the bill and exhibits, and the honorable the attorney general is restrained from instituting any suit for enforcing said circular or for the disregard by the complainants of the requirements of the same. This order granted by me upon information that Judge Hillyer, of the Atlanta circuit, is disqualified to preside in the cause.

CLAIBORNE SNEAD,
Judge Sup'r Court of the Augusta Circuit.

88 I acknowledge due and legal service of the foregoing bill, exhibits, &c., and waive all other and further service.
Nov. 25, 1882.

JAMES M. SMITH,
Chair., &c.

AT CHAMBERS, AT AUGUSTA, *Dec.* 20, 1882.

Counsel for complainants and defendants consenting, it is—

Ordered, That the hearing of the motion for injunction, which motion was set for this day, be postponed until 10 o'clock a. m. the 20th day of January, 1883.

On motion of complainant's counsel (defendants' counsel neither consenting nor objecting), it is further—

Ordered, That the restraining order granted November 24, 1882, be continued in force until the hearing.

CLAIBORNE SNEAD,
Judge Sup'r Court.

89 *Bill for Injunction.*

THE GA. R. R. & B. Co. *et al.*
vs.
JAMES M. SMITH *et al.*, Railroad Commissioners.

Pending before Judge Snead on motion for injunction.

It is agreed by counsel for complainants and defendants in the above-stated case that the motion for injunction ordered to be heard by Judge Snead, at chambers, at Augusta, Georgia, at 10 o'clock a. m. December 20th, 1882, be postponed until the 18th day of January, 1883, in the hope that the decision of the supreme court in a similar case now pending in that court may be had by that time.

CLIFFORD ANDERSON,
Att'y General & of Counsel for Defendants.

90 Be it further remembered that by regular renewals and continuances said restraining order was kept in force and the hearing on the order to show cause was postponed until the — day of April, 1883, when, at the regular spring term, 1883, of said court, said order was rescinded.

Be it further remembered that at the same term of said court, it being the appearance term of said cause, to wit, on the 10th day of May, 1883, said cause came on to be heard before the Honorable William R. Hammond, judge of said court, presiding, on the bill and demurrer thereto, which demurrer is as follows, to wit:

"Demurrer."

Fulton Superior Court. Spring Term, 1883.

THE GEORGIA RAILROAD AND BANKING COMPANY and WILLIAM O. WADLEY, Executor of William M. Wadley, Dec'd.
vs.
JAMES M. SMITH and Others, Railroad Commissioners, *et al.*
} No. 28.

Bill for injunction.

91 And now come the respondents in the above-entitled bill and demur to said bill, and, for causes of demurrer, say—

First. That said complainants have not by their said bill made such a case as entitle them in a court of equity to the relief prayed for therein.

Second. That there is no equity in said bill.

Third. That complainants have a full, adequate, and complete remedy at law for the alleged grievances complained of in their bill.

Wherefore said respondents pray the judgment and decree of the honorable court dismissing said bill, and that they be hence discharged with their reasonable costs.

CLIFFORD ANDERSON,
Attorney General of Georgia & Counsel for Respondents.

Due and legal service of the within demurrer acknowledged and further service and notice waived.

May 10th, 1883.

JOS. B. CUMMING,
Complainants' Solicitor.

92 Whereupon the court sustained the demurrer and ordered, adjudged, and decreed that said bill be dismissed.

And now, within thirty days from the rendition of said judgment and decree, said spring term of Fulton superior court not having adjourned, complainants, by their solicitors, present this their bill of exceptions, praying that the same may be certified according to law, and say that the court erred—

First. In sustaining the demurrer to the bill.

Second. In deciding that there was no equity in the bill, thereby holding that said circular number thirty-one is legal and binding on complainants; that said act of October 14, 1879, is constitutional and valid and not in conflict with paragraph one of section two of article four of the constitution of the State of Georgia; that said act is constitutional and valid and not in conflict with paragraph nine, article one, of the constitution of the State of Georgia, which

93 forbids the imposing of excessive fines or the inflicting of unusual punishments; that said act is valid, constitutional, and binding upon complainants and not in conflict with paragraph one, section ten, of article one, of the Constitution of the United States, which prohibits the States from passing any act impairing the obligation of a contract.

Third. In deciding that complainants have a full, adequate, and complete remedy at law.

JOS. B. CUMMING,
A. R. LAWTON,
Complainants' Solicitors.

CLERK'S OFFICE, SUPERIOR COURT OF FULTON CO.,
ATLANTA, GA., *June* 9th, 1883.

I hereby certify that the foregoing bill of exceptions hereunto attached is the true original bill of exceptions in the case therein stated, to wit, Ga. R. R. & B. Co. *et al.*, plaintiffs in error, *vs.* R. R. Commission *et al.*, defendants in error, and that a copy thereof has been made and filed in this office.

Witness my signature and the seal of said court, affixed the day and year first above written.

C. H. STRONG,
Clerk Sup'r Court, Fulton Co.

94 I have examined the within bill of exceptions & find it correctly sets forth the facts as they transpired in the case, and also the judgments of the court on the demurrer filed by defendants to the bill.

May 22d, 1883.

CLIFFORD ANDERSON,
Att'y Gen'l.

I do certify that the foregoing bill of exceptions is true and contains all the evidence material to a clear understanding of the errors complained of; and the clerk of the superior court of the county of Fulton is hereby required and ordered to make out a complete copy of the record of said case and certify the same as such and cause the same to be transmitted to the next September term of the supreme court of Georgia, that the errors alleged to have been committed may be considered and corrected.

W. R. HAMMOND,
J. S. C., A. C.

Due and legal service of the within bill of exceptions acknowledged this 28th day of May, 1883.

CLIFFORD ANDERSON,
Attorney Gen'l of Georgia & Counsel for Pl'ffs in Error.

95 Supreme court of the State of Georgia.

FEBRUARY 9, 1884.

The honorable the supreme court of the State of Georgia met pursuant to adjournment.

Present: Their honors Jas. Jackson, chief justice, and Samuel Hall & M. H. Blandford, associate justices.

The following judgment was rendered:

THE GA. RAILROAD & BANKING COMPANY, Pl'ff in Error,
vs.
JAS. M. SMITH *et al.*, Railroad Commissioners, *et al.*, Def'ts in Error.

This case came before the court upon a transcript of the record from the superior court of Fulton county, and, after argument had, it is considered and adjudged by the court that the judgment of the court below be affirmed.

Opinion.

Supreme Court of Georgia.

THE GEORGIA RAILROAD *et al.*
vs.
SMITH *et al.*, Railroad Commissioners, *et al.*

By the court, JACKSON, C. J., delivering the opinion:

96 This case was before this court at the last term on the application for an injunction. In denying the writ of injunction then prayed for it was held that there was no equity in the bill on any of the grounds therein set out. On the return of the case to the court below the bill was demurred to for want of equity. The demurrer was sustained and the bill dismissed. The judgment dismissing the bill is now before us on the present writ of error. The same questions of law decided before on the application for the injunction, including the alleged violation of the Constitution of the

United States in the construction put by the court below and affirmed by this court on the 12th section of the act incorporating the plaintiff in error, are the only questions now made again.

The case, therefore, is *res adjudicata*, and the judgment sustaining the demurrer and dismissing the bill must be affirmed.

Judgment affirmed.

97 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, GA., *Aug. 7th*, 1885.

I hereby certify that the foregoing pages, hereto attached, contain the original writ of error and citation, with copies of the petition for writ of error and bond; a complete transcript of the record and copies of the bill of exceptions and of the judgment and opinion of the supreme court of the State of Georgia in the case therein stated, as appears from the records and files of this office.

Witness my signature and the seal of said court, hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia, 1345.]

Z. D. HARRISON,
Clerk S. C. Ga.

Endorsed on cover: Georgia supreme court. No. 284. The Georgia Railroad and Banking Company, plaintiff in error, *vs.* James M. Smith, Campbell Wallace, and Leander N. Trammell, railroad commissioners of Georgia, and Clifford Anderson, attorney general of Georgia. Filed September 11, 1855.

Office Supreme Court U. S.
FILED.
JAMES H. McKENNEY.

SUPREME COURT OF UNITED STATES.

THE GEORGIA RAILROAD AND BANKING COMPANY,
Plaintiff in Errror,

vs.

JAMES M. SMITH, CAMPBELL WALLACE AND LEANDER N. TRAMMELL, RAILROAD COMMISSIONERS,
and
CLIFFORD ANDERSON, ATTORNEY GENERAL OF THE STATE OF GEORGIA,
Defendants in Error.

BRIEF

OF JOS. B. CUMMING,

FOR PLAINTIFF IN ERROR.

THE GEORGIA RAILROAD AND BANKING COMPANY,
Plaintiff in Errror,
vs.
JAMES M. SMITH, CAMPBELL WALLACE AND LEANDER N. TRAMMELL, RAILROAD COMMISSIONERS,
and
CLIFFORD ANDERSON, ATTORNEY GENERAL OF THE STATE OF GEORGIA,
Defendants in Error.

IN SUPREME COURT OF UNITED STATES.

BRIEF

OF JOS. B. CUMMING,

FOR PLAINTIFF IN ERROR.

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1. STATEMENT OF THE CASE.

The Georgia Railroad Company was incorporated by the Legislature of Georgia, December 21st, 1833.

The first amendment to its charter, viz: by the Act of the Legislature of Georgia, approved December 18th, 1835, among other things, inserted in the name of the Company the words, "and Banking." Hence its present corporate name.

At the time the charter was granted, including those provisions, to which special attention will be invited hereafter, there was no provision of law in Georgia reserving to the Legislature the right to repeal or modify charters. This provision of law appeared for the first time in the Jurisprudence of the State in the Code, which went into effect January 1st, 1863. See Code of Georgia, Section 1682.

In the next section (1683) of the Code, the principle of the Dartmouth College Case is expressly recognized, and it is declared that "private corporations heretofore created without the reservation of the right of dissolution * * * * * are not subject to dissolution."

In Section 12 of the original charter of the Plaintiff in Error was this provision: "The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads to be by them constructed while they see fit to exercise the exclusive right: *Provided* that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles and ten cents per cubic foot on articles of measurement for every hundred miles, and five cents per mile for every passenger."

The claim of Plaintiff in Error is that the language quoted contained a grant to it of the right to charge the rates named: that in this language "the Legislature fixed permanently the limit of the charges to which the Railroad Company could legally go;" that the Company "built its road and established the contemplated business with this grant as a part of its charter;" and that such grant is a contract between the Company and the State of Georgia, the obligation of which cannot be impaired by an Act of the Legislature.

These questions were raised in this manner: The Georgia Railroad and Banking Company and one William O. Wadley, the latter as executor of William M. Wadley, who was the Lessee of The Georgia Railroad and Banking Company, filed their Bill in Equity against the Defendants in Error in the Superior Court of Fulton County, Georgia, which Court had jurisdiction, under the laws of Georgia, of said Defendants and of the subject matter of the suit. In this Bill Complainants set out the provision of the charter, above quoted, and claimed that by virtue thereof and of the Deed of

Lease there existed at the time of the filing of the Bill the following legal status of Complainants, to-wit: The Georgia Railroad and Banking Company owned the right in perpetuity to transport persons and property on the line of Railroad and to charge fare for every passenger not exceeding five cents per mile, and freight for property at the rate not exceeding fifty cents per hundred pounds for heavy articles, and ten cents per cubic foot for articles of measurement for every one hundred miles; and that William O. Wadley, as Executor of William M. Wadley, then enjoyed that right and would enjoy it for the time limited in said Deed of Lease unless the lease was sooner surrendered or forfeited. That notwithstanding said Deed of Lease, the Georgia Railroad and Banking Company remained liable to the public, and to those whose persons and property were transported over the leased railroads, for any breach or failure of duty, and might incur, as well as the Lessee, the penalties denounced by a certain Act of the Legislature of Georgia, approved October 12th, 1879. (So much of said Act as bears upon this case is printed and annexed to this Brief.)

That the Board of Commissioners, created by said Act, assumed to prescribe to Complainants rates of freight and passenger tariffs, less than those allowed by the charter of the Georgia Railroad and Banking Company. And that under such assumption, the Commissioners had, by a certain instrument, known as "Circular No. 31," prescribed rates of freight far below those which said Railroad Company was allowed by its charter to charge.

That the Act, under which said Circular was issued, was unconstitutional as to the Constitution of the State of Georgia, under two provisions of that Constitution.

And that it was in conflict with Paragraph 1, of Section 10 of Article 1 of the Constitution of the United States.

Upon these averments, an Injunction was asked against said Commissioners, restraining them from enforcing said Act of the Legislature against Complainants.

To this Bill the Defendants demurred as follows:

* * * "And now comes the respondents in the above entitled bill and demur to said bill and for causes of demurrer say: First, That said complainants have not by their said bill made such a case as entitled them in a Court of Equity to the relief prayed therein. Second, That there is no equity in said bill. Third, That complainants have a full, adequate and complete remedy at law for the grievances complained of in their said bill." Record, page 18.

Upon this demurrer the following judgment was rendered:

"The Defendants in the above stated case having filed a

demurrer to the above stated Bill at this the first term of the Court after the filing of said Bill, and the same having been this day heard in its order duriag said term, both parties being represented and announcing ready for said hearing:

It is ordered and adjudged that said demurrer be, and the same is, sustained and said Bill is dismissed," etc. Record, page 20.

This judgment was taken up to the Supreme Court of Georgia by Bill of Exceptions, in which the Assignments of Error were as follows:

"First. In sustaining the demurrer to the bill.

Second. In deciding that there was no equity in the bill, thereby holding that said Circular, number thirty-one, is legal and binding on Complainants; that said Act of October 14, 1879, is constitutional, valid and not in conflict with paragraph one of section two of article four of the Constitution of the State of Georgia; that said Act is Constitutional and valid and not in conflict with Paragraph 9, Article 1, of the Constitution of the State of Georgia, which forbids the imposing of excessive fines or the inflicting of unusual punishment; that said Act is valid, constitutional and binding upon Complainants and not in conflict with Paragraph 1, Section 10, of Article 1, of the Constitution of the United States, which prohibits the States from passing any Act impairing the obligation of a contract.

Third. In deciding that Complainants have a full, adequate, and complete remedy at law." Record page 34.

The Certificate to the Bill of Exceptions (which certificate under the laws of Georgia is the Writ of Error) was as follows:

"I do certify that the foregoing Bill of Exceptions is true, and contains all the evidence material to a clear understanding of the errors complained of; and the clerk of the Superior Court of the County of Fulton is hereby required and ordered to make a complete copy of the record of said case and certify the same as such, and cause the same to be transmitted to the next September term of the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected. Record, page 35.

W. R. HAMMOND,
J. S. C., A. C."

The Judgment and Opinion of the Supreme Court of Georgia were as follows:

"The Georgia Railroad and Banking Company, Plaintiff in Error,

vs.

James M. Smith *et al.*, Railroad Commissioners, *et al.*, Defendants in Error.

This case came before the Court upon a transcript of the record from the Superior Court of Fulton County, and, after argument had, it is considered and adjudged by the Court that the Judgment of the Court below be affirmed. Record, page 35.

OPINION.

Supreme Court of Georgia.

The Georgia Railroad *et al.*,

vs.

Smith *et al.*, Railroad Commisioners *et. al.*

By the Court, Jackson, C. J., delivering the opinion:

This case was before this Court at the last term on application for an injunction. In denying the writ of injunction then prayed for it was held that there was no equity in the Bill on any of the grounds therein set out. On the return of the case to the Court below the bill was demurred to for want of equity. The demurrer was sustained and the bill dismissed. The judgment dismissing the bill is now before us on the present writ of error. The same questions of law decided before on the application for the injunction, including the alleged violation of the Constitution of the United States in the construction put by the Court below and affirmed by this Court, on the 12th Section of the Act incorporating the Plaintiff in Error, are the only question now made again.

The case, therefore, is *res adjudicata*, and the judgment sustaining the demurrer and dismissing the bill must be affirmed.

Judgment affirmed." Record, pages 35–6.

II.

Errors Assigned.

The errors complained of in this Court are:

1. 2. That the Supreme Court of Georgia held that the Act of the Georgia Legislature of October 14, 1879, hereinbefore referred to and printed with this Brief, though empowering the Defendants in Error to impose on the Georgia Railroad and Banking Company rates for freight and passenger traffic less than those authorized by its Charter, does not impair the obligation of a contract, and is not in conflict with Paragraph 1 of Section 10 of Article 1 of the Constitution of the United States.

2. That the Supreme Court of Georgia affirmed the decision of the Court below, sustaining the demurrer and dismissing the bill.

III.

Argument.

I. Right of the Complainant Company to fix its own rates for freight and passengers within certain limits.

This right is claimed under the following language of the 12th Section of the Company's Charter: "The said Georgia Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce over the Railroad and Railroads, to be by them constructed, while they see fit to exercise the exclusive right; *Provided*, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement for every hundred miles, and five cents per mile for every passenger," etc.

Plaintiff in Error under this language claims the right to fix its own rates for freight and passengers within the limits named.

Defendants in Error claim that this language does not limit the rates to be charged, but makes those rates a condition of exclusiveness in the use of the railroad.

In other words the Company claims that this Section defined its business; and inasmuch as it was a business subject to regulation by the Legislature, the Legislature did, in fact, regulate it.

And the Defendants in Error claim that the only object in naming rates was to prescribe the terms on which the Company was to have the *exclusive* use of its roads. So that, under the construction claimed by the Defendants in Error, this Section would mean: The Company shall have the right to transport freight and passengers, subject, like other common carriers, to control as to its rates; *Provided*, however, that whenever the Company shall charge higher rates than those named in this Section, the *exclusiveness* of its use of its road shall be forfeited; that is to say, the language commencing with the word "Provided" was not a grant by the Legislature of the right to make rates, but was simply a condition upon which the Company's use of the road was to be exclusive.

The error of this construction by the Defendants in Error has grown out of their misapprehension of the purpose of this 12th Section. They have overlooked the fact that its purpose was to grant to the Company the franchise to pursue the business of common carrier. In the orderly arrangement of the provisions of the Charter, the point is reached at this 12th Section, where the Legislature for the first and only time in the Charter grants the franchise to carry on business. Up to this point nothing has been said in the Charter as to the business which the Company is to carry on.

Section 1. Describes the roads to be built.

Section 2. Grants an exclusive privilege for thirty-six years to build railroads in certain defined territory.

Section 3. Authorizes the capital stock and directs how it shall be divided, etc.

Section 4. Opens books and appoints commissioners to receive subscription.

Section 5. Provides how long the books shall be kept open, etc.

Section 6. Directs how the Company shall organize.

Section 7. Prescribes the voting power of the shares.

Section 8. Provides for the election of President and Directors.

Section 9. Names the Corporation, gives it perpetual succession and the usual attributes of corporations generally.

Section 10. Authorizes the obtaining by purchase, contract, etc., of lands, right of way, etc.

Section 11. Provides the means for exercising the right of eminent domain.

And then comes this 12th Section, after the corporation, by the preceding sections, is completed and the means provided to perform

the purposes of its creation, and says what that business shall be, and grants the franchise to carry it on.

This all important section, bringing into life the business of the corporation, the Defendants in Error treat as if its purpose was to name the condition, upon which the business was to be "exclusive."

If the theory of Defendants in Error is correct that these prescribed rates were the condition of exclusive enjoyment, then we are driven to this, to us harmless conclusion: That the Legislature in the language of the Charter, says to the Georgia Railroad and Banking Company: You may carry on the business of transportation on your Road and charge these rates for it, and it shall be your own exclusive business so long as you do not exceed these rates.

This then would be the contract and *this* the contract which the Act of 1879 would impair.

We say we are driven to this conclusion, for otherwise we can find nowhere in the Charter a grant of the franchise to carry on business. If this section simply provides the terms on which the enjoyment of this business is to be exclusive, the Legislature was at pains to provide exclusiveness for a business; the right to carry on which the Charter granted nowhere.

If this is a grant of the privilege of *exclusiveness*, where then is the grant of the franchise *to carry on business?*

The view of Defendants in Error might be sound if the language of the Section read: "The said Georgia Railroad Company shall at all times have the right of transportation or conveyance of persons, merchandise and produce over the railroads, to be by them constructed, and said right shall be exclusive; *Provided* its charges are," etc.

But the language of the 12th Section being what it is, that Section contains a grant of the franchise of carrying on the business of a common carrier and prescribed the rates which the Corporation may charge. The use of the word exclusive might have seemed to the legislative mind of that day to be desirable on account of the crude and unsettled ideas then prevailing to some extent in reference to railroads. Says Professor Hadley (Railroad Transportation, page 11). "When the first charters were granted in England and Germany, it

was assumed that the company would own the road bed, simply as a canal company would own its canal; that any man could own cars and run trains just as he would run canal boats or wagons."

Probably the good sense of our fathers appreciated these "obvious absurdities," as Professor Hadley calls them; and this word "exclusive" was inserted for the purpose of putting them down.

The next (13) section of the Charter strongly sustains this view, namely, that it was thought necessary to secure the exclusive use of their railroad to the corporators by express enactment. For the first paragraph of that section is as follows:

"If any person or persons shall intrude upon the said railroad or railroads, or any part thereof, by any manner of use thereof, or of the rights and privileges connected therewith, without permission or contrary to the will of said Company, he or they shall forthwith forfeit to the Company all the vehicles and animals that may be so intrusively introduced thereon," etc., etc.

Evidently our fathers participated to some extent in the erroneous ideas of the day, and thought that persons other than the Corporation might seek to use its road; and as this Corporation was a favorite with the Legislature (see its perpetual exemption from taxation, and its exclusive privilege to build railroads for a long period) put in this word "exclusive" for the purpose of securing an advantage to its favored child.

At any rate the word was used for whatever it may have been worth; the franchise was granted to carry on business of transportation, and the language ushered in by the word "*Provided*," applies to the whole grant, not to one word only of the grant. Admitting that the language is a condition, by what warrant is that condition made to apply only to the word "exclusive?"

Let us apply this theory of Defendants in Error to other provisions in this same 12th Section of the Charter.

The Section is as follows:

"The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise, and produce, over the Railroad and Railroads, to be by them constructed, while they see fit to exercise the exclusive right: *Provided*, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles; and five cents per mile for every passenger: *Provided always*, That the said Company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons on the Railroad or Railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subje t to the rates above mentioned."

According to the Defendants in Error, the first phrase commencing "Provided" states a condition, on which the right is to be exclusive. Why does not the phrase immediately following, beginning also with this, to Defendants in Error, weighty word "*Provided*," also impose a condition on the *exclusiveness* of the right? The phrase is this: "*Provided always*, That the said Company may, when they see fit, rent or farm out all or any part of their said exclusive right," etc., etc. Why has not this phrase the same right as its next neighbor to impose a condition on the exclusiveness? But to give it this meaning would be to make the power to lease a condition of exclusive enjoyment—*i. e.*, exclusive enjoyment would be granted to the Company on condition that it would part with the enjoyment, the enjoyment would be exclusive on condition that it was *not* exclusive—which is the *reductio ad absurdum*.

In fact, unwarranted significance is given to this word "Provided." It seems, that in the legislation of the State, at that period, it had no fixed meaning. It meant different things in different places, and in many places meant nothing, except that at those places a new patch was inserted in the legislative patchwork. Generally it was simply the war horse of the legislator of the period, which he bestrid whenever he intended to dash into the legislative melee with an amendment. Its use in this 12th Section, if the view of Defendant in Error be correct as to the meaning when first used, shows conspicuously how unsettled its meaning and office were. The assertion is confidently hazarded, that if the legislation of that period is examined, this word "*Provided*" will be found doing duty, generally, simply to show where an amendment has been made—as a

word ushering in a new feature, quite as often as limiting or conditioning what has gone before—and frequently in a manner totally at variance with such limitation or condition. The following citations, among many others accessible, are made to illustrate this last use of the word:

Section 27 of the Charter of Plaintiff in Error.

Section 45 of the Charter of Plaintiff in Error.

Section 7 of Act incorporating town of Monroe, as follows.

Section 7. And be it further enacted by the authority aforesaid, That in case any person or persons, who are liable for the same, shall refuse to pay any tax to be imposed by any by laws or regulations of said town, in pursuance of the authority of this Act, then and in that case, the Commissioners of said town; or a majority of them, shall, and they are hereby authorized to issue their warrant, directed to any officer, to be by them appointed, requiring him to levy and sell off the goods and chattels of the person or persons so refusing, to make the amount of tax imposed; and said officer shall receive such fees as are allowed by law to Justices of the Peace and Constables in similar cases: Provided, that all sales to be made by virtue of such warrant shall be advertised at least ten days, at the court-house door in said town.

Acts of 1831, page 240.

Section 4 of Act incorporating town of Jefferson, ; *ibid*, 246; as follows:

Section 4. And be it further enacted, That the said Commissioners shall continue in office until the first Saturday in January, one thousand eight hundred and thirty-two, on which day, and on the first Saturday in January every year thereafter, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of that day, all the free male white citizens of said town, who shall have given in their taxable property, and are entitled to vote for members of the General Assembly, shall assemble at the court-house of said county, and by ballot elect three Commissioners, who shall continue in office for the term of one year, at which election any one or more Justices of the Peace, or Justice of the Inferior Court of said county, shall preside: Provided, That the Commissioners, after naving served the the term of one year, shall be, and they are hereby, re-eligible to the said appointment.

Section 5 of Act incorporating Manufacturing Co.; Acts of 1832, page 84; as follows:

Section 5. And be it further enacted, That for the well ordering of the affairs of the said corporation, there shall be five directors, who shall be elected by the stockholders at any time after the stock of said company, or one-half thereof at the least, shall have been subscribed for, and the sum of five thousand dollars or more paid into the hands of the Commissioners horeinbefore named, which said election shall be held in the town of Decatur, DeKalb County, at such place and time as shall be appointed by said Commissioners and of which they shall give at least ten days' notice in one of the public gazettes of

this State, at which said election and each and every subsequent election of directors a plurality of the votes given in shall be sufficient to make a choice, and the directors who may be chosen at the first election, shall hold their offices until the first Monday in October, in the year eighteen hundred and thirty-four, and until their successors are re-elected and qualified, and in each and every year thereafter, on the first Monday in October, the directors shall be chosen by the stockholders or proprietors of the capital stock of said corporation, and those who shall be duly chosen at any election shall be capable of serving as directing, by virtue of such choice, until the end or expiration of the first Monday in October next ensuing the time of such election, and until their successors be elected and qualified; and the said direetors at their first meeting after each election shall choose one of their number as President, and in case of his death, removal from the State or from the Board of Directors, the said directors shall proceed to fill his vacancy by a new election for the remainder of the year: Provided always, That in case it shall at any time happen that an election of directors should not be made upon any day when pursuant to this act it ought to have been made; the said corporation shall not for that cause be deemed to be dissolved, but it shall be lawful on any other day to hold and make an election of directors in such manner as shall be ordained by the rules and by laws of said corporation: And provided, That in case of the death, resignation, absence from the State or removal of a director, his place may be filled up by a new choice for the remainder of the year by the remaining directors.

Section 6 of Act incorporating Augusta Mining Co., *ibid*, 91.; as follows:

Section 6. And be it further enacted, That for the well ordering of the affairs of the said corporation there shall be five directors who shall be stockholders, and that Peter Bennock, Samel H. Peck, Franklin C. Heard, William B. Shelton and Edward Garey be, and they are hereby, appointed the first directors under this Act, who shall hold their offices until the first Monday in January, in the year of our Lord one thousand eight hundred and thirty-four, on which said day and on the first Monday on each and every January thereafter the directors shall be chosen by the stockholders or proprietors of the capital stock of said company, when a plurality of votes given in shall be sufficient to make a choice; and the directors appointed by this Act, and also those which shall hold tneir offices until their successors shall be elected and qualified pursuant to the directions of this Act; and the said directors at their first meeting after the passage of this Act, and after each election shall choose one of their number as President; and in ease of his death, resignation or removal from the State, or from the Board of Directors, the said directors shall proceed to fill the vacancy by a new election for the remainder of the year: And provided always, That in case it should at any time appear that an election of dtrcctors should not be made upon any day when pursuant to this Act it ought to have been made, the said corporation shall not for

that cause be deemed to be dissolved; but it shall be lawful on any other day to hold and make an election of directors, in such manner as shall have been regulated by the rules and by-laws of said corporation: And provided also, That in case of the death, resignation, absence from the State or removal of a director, his place may be filled up by a new choice for the remainder of the year by the remaining directors.

Under the construction claimed by Defendants in Error, the effect of charging more than the rates prescribed in the charter would not be a violation of the charter. They would work a forfeiture of the "exclusive" privilege, but they would not be unlawful and could therefore be collected.

But, as Defendants in Error contend, the Supreme Court of Georgia, in the case of Arnold & DuBose vs. The Georgia Railroad and Banking Company, 50 Ga., 304, was of a different opinion. That suit was brought on the theory that the Legislature had prescribed those rates as binding on the Company to govern its business. The Court so decided, and held (see second head note): "The Georgia Railroad and Banking Company, under the 12th Section of its charter, can only charge for freight fifty cents per one hundred pounds on heavy articles for one hundred miles, and in proportion to that rate for a less distance than one hundred miles."

Thus we find the Court deciding, directly in accordance with our views of this section, that this language was the law of freight and passenger rates for this Company.

It is admitted by Plaintiff in Error—

That language in a charter, relied on to sustain an exemption from the operation of a general tax law, must be clear and unequivocal.

That grants of an exclusive privilege will not be presumed, and must be based upon express words.

That the grant of franchises, which affect public interest, will be construed strictly.

But it is also true that rights are taken from the public and given to corporations, when such would be the effect of "the words naturally and properly construed" (Pierce on Railroads, 154), "and

words even in the charter of a corporation conferring valuable franchises are commonly to be taken according to their natural import." 26 Ga., 651, 661.

"But the true rule in this, as in all other cases, is not to be astute in finding an ambiguity, and to give the language a fair construction in the light of surrounding circumstances, to ascertain the legislative intent."

If, as the Plaintiff in Error contends, the language of the 12th Section of its Charter was the grant of the franchise to fix its charges within certain limits, such grant is a contract, the obligation of which cannot be impaired by an Act of the Legislature.

9 Lea, 615, 616, Ragan & Buffit vs. Aiken.

II. If the right to fix charges exists, it is a contract right.

It would be inexcusable to consume time in arguing a proposition, brought down from the Dartmouth College case (4 Wheaton) to the present hour, by an unbroken line of authority, that the charter of a private corporation is an executed contract between the government and the corporators, and that the Legislature (in the absence of power reserved for that purpose) cannot repeal, impair, or alter it against the consent of the corporation, or without its default judicially declared.

Out of the mass of the authority sustaining this proposition, we cite a comparatively small number of cases:

Young *et al.*, *vs.* Harrison *et al.*, 6 Ga., 130;
Dozier *vs.* Thornton, 19 Ga., 325;
Georgia *vs.* The Georgia R. R. & B. Co., 54 Ga. 423;
Goldsmith, Comptroller General *vs.* The Georgia Railroad and B. Co.

These last two decisions were rendered upon the charter of Plaintiff in Error.

Binghamton Bridge Case, 3 Wallace 73.
Stone *vs.* Miss., 101 U. S., 816.

In Chicago, etc., R. R. Co. *vs.* Iowa, 94 U. S., 155, the Chief Justice says, on page 162: "It was in the power of the Company to call upon the Legislature to fix permanently this limit, and make it part of the charter; and if it was refused, to abstain from building the road, and establishing the contemplated business. If this had been done, the charter might have presented a contract against future legislative interference."

In Ruggles *vs.* Iowa, 108 U. S., on page 533, Mr. Justice Harlan says, referring to the case last cited: "Touching that case, it may be observed that the Court conceded that a railroad corporation might be protected by its charter against absolute legislative control as to the rates of fare and freight."

In Peik *vs.* The R. R. Co., 94 U. S., 164; Railroad Co. *vs.* Blake, *ibid.* 180; and in Ruggles *vs.* Illinois, 108 U. S., 526, the decisions subjecting the Railroad Companies to legislative control were put on the ground that there was nothing in the chartersof the companies limiting the power of the State to regulate charges for freight and passengers.

But in the last named case (Ruggles *vs.* Illinois, 108 U. S., 526) Mr. Justice Harlan says, on page 537: "These cases"—the three last cited—"establish, among others, these principles: 1. That the charter of a railroad corporation is a contract within the meaning of the contract clause of the Federal Constitution. 2. That such corporation may be protected by its charter against absolute legislative control in the matter of rates for the carriage of passengers and freight," etc., etc.

In the Railroad Commission Cases, 116 U. S., 307, 347, it was held that language in a railroad charter, granting the right "from time to time to fix, regulate and receive the tolls and charges to be by them received for transportation," and language which provides that the president and directors "may adopt and establish such tariff of charges for the transportation of persons and property as they may think proper," and the same "alter and change at pleasure" does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges which the railroad companies have established.

Some of the reasons for the decision are thus given by the Chief Justice: "There is no rate specified nor limit set"—(How different the charter of Plaintiff in Error!) "nothing whatever is said of the way in which the question of reasonableness is to be settled. All this is left as it was," page 330. Again: "The right to fix reasonable charges has been granted, *but the power of declaring what shall be reasonable is not surrendered,*" page 330.

On the same page it is said: "This is not in conflict with the judgment of the Supreme Court of Mississippi in Railroad Commission *vs.* Yazoo and Mississippi Railroad Co., in which it was decided that *the power had been surrendered in favor of the Company because in that charter a maximum of rates was fixed.*"

The case thus spoken of, viz: Railroad Commission of Mississippi *vs.* Yazoo and Miss. Valley R. R. Co. (to be found in 21 American and English Railroad Cases, page 6), contains this opinion:

"Section 6 of the charter of the appellee confers on the company power to fix, from time to time, by its board of directors, the rates at which it will transport persons or property over its railroad, provided they shall not exceed a maximum specified in the act.

The power to contract is an essential attribute of sovereignty, and is of prime importance. Its exercise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. The power to contract implies the power to make a valid contract. Chartering railroad companies and other similar associations has long been an acknowledged and favorite exercise of the legislative authority. The right to grant charters includes the right to grant such as will be upheld. Conferring power on the grantee of the franchise to fix rates of compensation at discretion or within prescribed limits fixed by the charter, has been the common practice of the Legislatures of the States of the United States from an early period of their history. The right of the corporation to exercise the powers conferred by the act of incorporation, whether to fix rates themselves or to take those fixed by their charter, and to rest securely on its provisions in this respect, has hitherto been generally regarded as indisputable.

A grant in general terms, of authority to fix rates, is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation, which shall be just and reasonable. It is only where there is unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation, that the power of the Legislature afterwards to interfere, can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the Legislature an intent to part with any power, it will be done. Only what is plainly parted with, is gone.

Fixing rates in a charter is a specification of what is reasonable—an exclusion of tacit or implied conditions on the subject. It is an essential part of the contract of incorporation—the most important condition of its existence—the inducing cause of its acceptance.

That it was the legislative intent to vest in the appellee the unrestricted right to fix rates, within limits prescribed by the charter, is clear. That this was a valid contract by the State, obligatory and inviolable by it, we regard as settled authoritatively by Federal and State decisions too numerous for citation.

If anything is or ever can be settled in American Constitutional law, the sanctity and inviolability of the contract between a State and

individuals, in the shape of a charter for a business enterprise, accepted and acted on by the corporators, on the faith of its terms and provisions, must be so regarded.

The appellee has the unquestionable right, from time to time, by its board of directors, to fix .ates at which it will transport over its railroads; provided these ıates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of them capital was invested, and the enterprise set on foot. It is not allowable, now, for one of the contracting parties to interfere with the exercise by the other of its plainly granted rights.

They are secure beyond the reach of legislation, and cannot be impaired. The State cannot, by an Act of its Legislature, abdicate the right to govern artificial as well as natural persons; but it may create corporations, and where they are not a part of the machinery of government, the franchise cannot be resumed by the Legislature, or its benefits be essentially impaired, without the consent of the grantee. To hold otherwise would be revolutionary, and disturb the foundations of society as moulded by the judicial utterances of half a century of constitutional government in America."

Jas. B. Cumming,
for Plaintiff in Error.

APPENDIX A.

AN ACT.—To Incorporate the Georgia Railroad Company, with powers to construct a Rail or Turnpike Road from the City of Augusta, with Branches extending to the Towns of Eatonton, Madison, in Morgan County, and Athens; to be carried beyond those places, at the discretion of said Company; to punish those who may wilfully injure the same; to confer all corporate powers necessary to effect said object; and to repeal an Act entitled "An Act to authorize the formation of a Company for constructing a Railroad or Turnpike from the City of Augusta to Eatonton, and thence westward to the Chattahoochee River, with Branches thereto, and to punish those who may injure the same," passed the 27th December, 1831.

1. Sec. 1. Be it enacted, etc., That the Company provided for in this Act, and hereinafter more especially incorporated and authorized, shall and may direct and confine there first efforts and enterprise to the formation and completion of a Railroad communication between the City of Augusta and some point in the interior of the State, to be agreed upon by the stockholders, which Road shall be called the Union Railroad; and the same being completed, the Company shall have power to construct three Branch Railroads, beginning at the point agreed upon as the termination of the Union Road, or such point for the Middle Road as the stockholders may select; one running to Athens—one to Eatonton—and the third to Madison, in Morgan County; which Branches shall be erected simultaneously; Provided, The amount of stock subscribed will warrant the completion of all at the same time; and if the stock subscribed will not warrant the completion of all of said Branches at one and the same time, then that Branch shall be first completed which the stockholders may by vote designate. The company shall have the further power to continue the Athens Branch towards any point which may be agreed upon, on the Tennessee River—all of which shall be done at such time and in such manner as the stockholders may direct.

2. Sec. 2. The Company shall have the exclusive privilege of constructing Railroads from any point in this State within twenty miles of the Road herein designated as the Union Road and its Branches, leading to Eatonton, Athens and Madison, continuously to the City of Augusta, for and during the term of thirty-six years.

3. Sec. 3. The stock of the Company authorized and incorporated by this Act shall consist of fifteen thousand shares, of one hundred dollars each share, and the said Company to be formed on that capital; but the said Company shall be at liberty to enlarge their capital, as, in the progress of their undertaking, they may find necessary; and that, either by additional assessments on the original shares, not to exceed in the whole the sum of twenty dollars in addition to each original share, or by opening books for enlarging their capital by new subscriptions in shares of not more than one hundred dollars, so as to make their capital adequate to the works they may undertake, and also to prescribe the terms and conditions of the new subscriptions. And it shall be lawful for the Company, from time to time, to invest so much, or such parts of their capital, or of their profits, as may not be required for immediate use, and until it may be so required, in public stock of the United States, or of this State, or of any incorporated

Bank, or lend out the same at interest on good security, and draw and apply the dividends, and when and as they shall see fit, sell and transfer any parts or portions thereof: Provided, That nothing herein contained shall be so construed as to authorize said Company to issue bills of credit, or to loan out any moneys at a greater rate of interest than eight per cent.

4. Sec. 4. Books for subscription to the stock of the Company hereby authorized shall be opened in Athens and Eatonton for two thousand five hundred shares in each place, to wit:

In Athens, by William Williams, James Camak, Stevens Thomas and William Dearing.

In Eatonton, by Josiah Flournoy, Henry Branham, C. P. Gordon and Irby Hudson.

In Madison, for two thousand shares, by L. Johnson, E. A. Nisbet, A. G. Saffold and J. B. Walker.

In Greensborough, for fifteen hundred shares, by N. Lewis, Thomas Stocks, Thomas Cunningham and W. C. Dawson.

In Sparta, for one thousand shares, by William Terrel, Joel Crawford, W. H. Sayre and Charles E. Haynes.

In Warrenton, for five hundred shares, by Thomas Gibson, Henry H. Lockhart, Gray A. Chandler and Solomon Locket.

In Crawfordville, for five hundred shares, by Absalom Janes, John Mercer, Henry B. Thompson and Archibald Gresham.

In Augusta, for fifteen hundred shares, by Thomas Cumming, Wm. H. Turpin, Wm. C. Micou and John W. Wilde.

In Washington, for one thousand shares, by D. P. Hilhouse, Samuel Barnett, Jos. W. Robinson and L. S. Brown.

In Lexington, for one thousand shares, by John Moore, John Banks, Joseph H. Lumpkin and Edward Cox; and

In Appling, for one thousand shares, by Thomas N. Hamilton, Archer Avery, Wat L. Collins and Wensley Hobby.

And the books, by said Commissioners, or a majority of them, shall be opened in each of the said places on the same day, which is hereby fixed to be on the first Monday in February next; and the different sets of Commissioners shall advertise the time and place of subscribing in the gublic gazette or gazettes of the places respectively; and if no gazette be published at any of the places, these Commissioners shall advertise in the Georgia Journal and Federal Union; and such advertisement shall be inserted at least three weeks prior to the day fixed for opening the books: *Provided*, That if any of the Commissioners, at the time of opening the books, shall be sick or unable to attend, the other three Commissioners, or a majority of them, may choose a proper and discreet person to supply his place; and if any of the Commissioners before named shall, after the passing of this Act, renounce or decline acting, the Governor, upon being apprised thereof, is hereby requested to nominate and appoint fit and proper person or persons to supply the vacancy of him or them so declining to act. Upon the books being opened as aforesaid, the Commissioners,

or a majority of them, shall receive from individuals, corporations or companies, subscriptions for so many shares as they may see fit to subscribe for, not exceeding one hundred, until three days shall have expired, and, after that, for any number of the remaining shares they may think proper, on the condition that, at the time of subscribing, there shall be paid down to the Commissioners, or a majority of them, five dollars on each share subscribed; for which they shall give a receipt, and directly deposit the money in the Central Bank of Georgia, or any other incorporated Bank, subject to the draft or order of said Company, by its President or Board of Directors, after the Company shall be organized.

5. Sec. 5. The books shall be kept open for ten days at each place, between the hours of nine in the morning and three in the afternoon; and, being closed, on the last day, each set of Commissioners shall transmit to the Commissioners in Athens a list of the subscribers, designating on such list, as in the subscription books, the days on which the persons respectively subscribed, with the number of shares and sums paid set opposite to each name, with a certificate at the bottom of the list, to be signed by each Commissioner, that the money is deposited in Bank conformably to this Act; and thereupon the Commissioners in Athens shall, from all the list of subscribers, make out one general list, specifying the days respectively on each subscribed, so that, on summing up the whole, it may appear whether the stock is filled up, or falls short of the aforesaid capital. If the number of shares subscribed, and five dollars each paid thereon, shall fall short of the fifteen thousand shares, but amount to five thousand shares, the said Company may be formed thereon; and for the residue of the original number of shares, the said corporations, when organized, may cause books to be opened by the Directors, under sixty days' notice of the time and place of subscription, and receive such additional subscriptions as can be obtained on the same terms as aforesaid, of five dollars being paid on each share at the time of subscription; and may keep the books open until the whole number of fifteen thousand shares shall be subscribed.

6. Sec. 6. For the organization of the Company, the Commissioners at Athens shall appoint a convenient time and place for the meeting of the stockholders, which they shall cause to be advertised in one or more of the gazettes aforesaid for three weeks in succession previously to the day; at which time and place the subscribers may attend in person, or be represented and vote by proxy; and no one but a stockholder shall be capable of being a proxy, and the appointment shall be in writing, signed by the appointing member, and duly authenticated by the oath of a subscribing witness endorsed thereon, or annexed thereto by a lawful magistrate; and the meeting being assembled, the proxies examined and admitted, and a proper registry made of all subscribing members, by person or by proxy, who may be present, the Athens Commissioners, or a majority of them attending, shall present a ballot-box, in which the subscribers may vote for officers by ballot; and the presiding Commissioners shall count the ballots,

enter the same, and declare the result of the election, of which they shall make and deliver proper certificate or certificates under their hands. The officers to be elected shall consist of a President and twelve Directors for the first year, and thereafter such number of Directors as may be established by the By-Laws, to serve for one year, and until a new election be made.

7. Sec. 7. In the said election for President and Directors the votes shall be taken by the following rule: Each subscriber shall be entitled to a number of votes equal to the number of shares he may hold in the stock of said Company. And on all future elections of President and Directors, in the making, altering or repealing of By-Laws, in determining on measures involving the general interests of the Company, at any stated or occasional corporate meeting, the votes shall be governed by the above stated rule.

8. Sec. 8. The election of President and Directors shall be made annually, according to a By-Law to be made for that purpose; and in case any vacancy occur in the Board between two periods of general election, the Board of Directors, or a majority of them, at any stated and regular meeting of the Board, may elect by ballot, from among the stockholders, a person to fill the vacancy so occurred, until the next general election of Directors. But if it should so happen that the day of annual election of President and Directors shall pass without an election being effected, or any of them, the corporation shall not thereby be dissolved or deemed to be discontinued; but it may be lawful, on any other day, to hold and make such election, in such manner as may be prescribed by the By-Laws of the corporation, subject always to the rule prescribed in the seventh section of this Act.

9. Sec. 9. The aforesaid Company to be organized as aforesaid, shall be called "The Georgia Railroad Company," and shall have perpetual succession of members, may make and have a common seal, and break or alter it at pleasure; and by their corporate name aforesaid may sue and be sued, answer and be answered unto, in all courts of law and equity, or judicial tribunals of this State; and shall, at all times, be capable of making and establishing, altering and revoking all such regulations, rules and By-Laws for the government of the Company and its Directors, as they may find necessary and proper for the effecting of the ends and purposes intended by the association and contemplated in this Act: Provided, Such rules and regulations, and By-Laws, shall not be repugnant to the Laws and Constitution of this State.

10. Sec. 10. The said Georgia Railroad Company shall have power and capacity to purchase, and have and hold, in fee simple, or for years, to them and their successors, any lands, tenements or hereditaments that they may find necessary for the site, on and along which, to locate, run and establish the aforesaid Railroad and Railroads, or any Branches thereof; or to vary or alter the plan or plans, and of such breadth and dimensions through the whole course of the Road and Roads, as they may see fit; and also, in like manner, to purchase any lands contiguous, or in the vicinity of the Railroad and Railroads, hereby authorized, that they may find necessary for the

procuring, and from time to time, readily obtaining all necessary or proper materials, of what kind soever, for the constructing, repairing, and adequately guarding and sustaining the said Railroad or Railroads; and in like manner to purchase all rights of way on land, and all necessary privileges in waters or water courses, that may lie on or across the route which the said Railroad or Railroads may pass; and also all lands contiguous thereto, that may be found necessary for the erecting of toll houses, store houses, workshops, barns, stables, residences and accommodations for servants or agents or mechanics, and for the stationing and sustaining all animals of labor. And the said Company shall have power, if need be, to conduct the Railroad across any public road, and, by suitable bridges over and across all or any rivers, creeks, water or water courses, that may be in the route; or if they should deem it more convenient and suitable, may pass carriages, using the Roads, by convenient boats, across the same: Provided, That the said Company shall so construct their Railroad across all public roads as not to obstruct or injure the same.

11. Sec. 11. [Relates to the right of way. Repealed by the Act of 1836, and the 15th section of the Central Railroad Act substituted.]

12. Sec. 12. The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise, and produce, over the Railroad and Railroads to be by them constructed, while they see fit to exercise the exclusive right: Provided, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles; and five cents per mile for every passenger: Provided, always, That the said Company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the Railroad or Railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said Company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the Company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers. And it shall be lawful for the said Company to use or employ any section of their intended Railroad, subject to the rates before mentioned, before the whole shall be completed, and in any part thereof, which may afford accommodation for the conveyance of persons, merchandise or produce. And the said Company shall have power to take, at the store houses they may establish on or annexed to their Railroad, all goods, wares, merchandise and produce intended for transportation or conveyance; prescribe the rules of priority; and charge such just and reasonable terms and compensation for storage and labor as they may by rules establish (which they shall cause to be published), or as may be fixed by agreement with the owners; which compensation shall and may be distinct from the aforesaid rates of transportation.

13. Sec. 13. If any person or persons shall intrude upon the said Railroad or Railroads, or any part thereof, by any manner of use thereof, or of the rights or privileges connected therewith, without permission, or contrary to the will of the said Company, he or they shall forthwith forfeit to the Company all the vehicles and animals that may be so intrusively introduced and used thereon, and the same may be seized by the Company or its agents, or recovered by suit at law. And moreover, the person or persons so intruding shall and may be indicted as for a misdemeanor, and, upon conviction, fined or imprisoned, or both, at the discretion of the court of the county. And if any person shall wilfully and maliciously destroy, or in any manner hurt, damage, injure or obstruct, or shall wilfully and maliciously cause, or aid and assist, or counsel or advise, any other person or persons, to destroy, or in any manner to hurt, damage or injure, or obstruct the said Railroad, or any Branch thereof, or any bridge connected therewith, or any vehicle, edifice, right or privilege granted by this Act, and constructed for use, under the authority thereof, such person so offending shall be liable to be indicted, and, on conviction thereof, shall be imprisoned at hard labor in the Penitentiary, at the discretion of the court, not less than four years, and shall be further liable to pay all the expenses of repairing the same. The one-half of all the fines that may be imposed by the court, under this Act, shall be paid to the informer, and the other half to the said Company.

14. Sec. 14. Whenever the Company aforesaid shall see fit to farm out as aforesaid, to any person or persons, or body corporate, any part of their exclusive right of conveyance and transportation, or shall deem it expedient to open the said road, or any part thereof, to public use, they shall and may adopt and enforce all necessary rules and regulations, and have power to prescribe the construction and size or burthen of all carriages and vehicles, and the materials of which such shall be made, that shall be permitted to be used or pass on the said Railroad, and the locomotive power that shall be used with them.

15. Sec. 15. The exclusive right to make, keep up and use the Railroads and transportations, authorized by this Act, shall be for and during the term of thirty-six years, to be computed from the time when the said Road from Augusta to either of the points hereinbefore designated, shall be completed for transportation: Provided, That the subscription of stock or shares of said Company to the amount of at least five thousand shares as aforesaid, be filled up within six months from the passing of this Act, and the work from, or between Augusta, and either of the places hereinbefore first mentioned, be commenced within two years and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other Railroads, for the trade and intercourse contemplated herein: Nevertheless, The Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up, and use Railroads over and

through such parts of the country that shall so have expired by the foregoing limitations; but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by the said incorporated Company. The stock of the said Company and its Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments.

16. Sec. 16. After the President and Directors shall be elected as aforesaid, it shall always be in the power of the said President and Directors, at a meeting of the Board, a majority being present, to nominate and appoint a Secretary, a Treasurer, and all other officers, agents and servants, that they may deem necessary, or as may be prescribed in the By Laws of said Company, removable at the pleasure of the Board of Directors; and also require and take from all officers, agents and servants such bond or bonds and security as the Board or By-Laws may prescribe, for securing the fidelity, obedience, accountability and correct conduct of the officers, agents or servants so appointed, and their punctuality in surrendering up all moneys and property on their being removed or displaced, or the term of their appointment expiring.

17. Sec. 17. The President and Directors, by an order signed by the President, shall have power to draw from the Central Bank of Georgia, or other banks of deposit, all such moneys as may have been received by the different sets of Commissioners, for the first payments by subscribers on their subscriptions of stock as before provided.

18. Sec. 18. Every person who shall be a subscriber to or holder of stock in said Company, shall pay to the Company the instalment of fifteen dollars on each and every share, in such periods of not less than six months, as shall be prescribed and called for by the Directors, after which the Directors may call for the further moiety of each share, in payments not exceeding fifteen dollars per share, in periods of not less than six months, of which periods of payment by instalment on the shares, and the sums required, the Board of Directors shall cause public notice to be given for at least four weeks previously to the day of payment, by advertising the same in one or more of the gazettes of Milledgeville and Augusta: And failure to pay up any one of the instalments so called for as aforesaid shall induce a forfeiture of the share and shares on which default shall be so made, and all past payments thereon, and the same shall vest in and belong to the Company, and may be appropriated as they shall see fit. It shall be the duty of the Company, as soon as may be after they are organized, or of the Board of Directors, to issue scrip to each subscriber for the shares he holds, and deliver the same at the time of the second payment; on which, if convenient and practicable, receipts for the instalments paid, and that may successively be paid, may be endorsed, and the scrip issued may be made assignable and transferable in person or by attorney, at the office and on the books of the Company; and the

said corporation shall and may, in and by their By-Laws, rules and regulations, prescribe the mode of issuing the evidences of shares of stock and the terms and conditions, as also the times and manner in which shares in the Company may be transferred.

19 Sec. 19. Whensoever the said Company shall find occasion to increase their capital by additional assessments on the original shares, as before mentioned, in the third section of this act, within the limits therein mentioned, the said further sum on each share shall not be called for in less than two instalments at similar periods, and like notices as are mentioned and provided in the immediately preceding section; and failure to pay up such additional assessments shall in like manner, as therein provided, induce a forfeiture to the Company of the share or shares of stock on which default should so be made.

20. Sec. 20 The President and Directors shall be styled "The Directors of the Corporation," and shall make all contracts and agreements in behalf thereof, and have power to call for all instalments, declare all dividends of profits, and to do and perform all other acts and deeds which, by the By-Laws of the corporation, they may be empowered or required to do and perform; and the acts of the Direction, or their contracts, authenticated by the signature of the President and Secretary, shall be binding on the corporation without seal. Regular minutes shall be kept of all meetings of the Direction, and of the acts there done; and the Direction shall not exceed in their contracts the amount of the capital of the corporation; and in case they shall do so, the President and Directors who are present at the meeting at which such contract or contracts so exceeding the capital shall be made, shall be jointly and severally liable for the amount of the excess, both to the contractor or contractors and to the corporation: Provided, That any one may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be recorded in the minutes of the Direction, and giving such notice thereof to the next general meeting of the stockholders.

21. Sec. 21. The Direction shall, once in every year at least, make a full report on the state of the corporation, and of its affairs, to a general meeting of the stockholders, and oftener if so directed by the By-Laws; and shall have power to call a general meeting of the stockholders, when the Direction shall deem it expedient; and the corporation may provide, in their By-Laws, for occasional meetings being called, and prescribe the mode thereof.

22. Sec. 22. If the Company, instead of constructing the Railroads herein specified, should deem it preferable to construct common roads, and use steam carriages thereon, they shall have power to do so under the same regulations, and with the same privileges in all respects as are herein prescribed in relation to railroads.

23. Sec. 23. The Act entitled "An Act to authorize the formation of a Company for constructing a Railroad or Turnpike from the City of Augusta to Eatonton, and thence westward to the Chattahoochee River, with Branches thereto, and to punish those who may injure the same," passed the 27th December, 1831, is hereby repealed

in every clause and section thereof; and this Act of incorporation shall be deemed and taken to be a Public Act, and shall be judicially taken notice of as such, without special pleading.

24. Sec. 24. Whensoever a number of the stockholders in interest amounting to three thousand shares, shall unite for the furtherance, construction and completion of either of said Branches of said Road, they shall have power to terminate said Union Road, and may, at such time and place as they may choose and designate, determine for themselves the point or place of divirging with such Branch of said Road as they may then and there point out and ascertain to be identified with their interest as stockholders: Provided, The said stockholders so electing shall have given to the said Union Company, their agents or attorney, ten days previous notice of such their choice, of their respective names and their respective amounts of stock, and of the point or place of their intended disunion. That said stockholders so electing and determining as aforesaid, shall and may then and there be and exist as a separate body corporate, and shall then and there, and thenceforward, have, use, and exercise all the rights, privileges, immunities and enjoyments hereby given, granted and secured to said Union Company, to attach, be held, used and exercised by said stockholders so electing as aforesaid, of, for, on account of, and to the particular Road to which they may then and there direct and apply themselves. That their powers as a corporate body shall be similar, and their rights, privileges and immunites, in regard to said Road, so diverging, shall be the same, and subject to the same restrictions, as herein and hereby provided, imposed and granted to, upon and for the said Union Company. They shall not be called on by said Union Company, from and after the day of their election and determining said point of diverging, for any other or further payment on stock, but may proceed as a distinct Company to construct a Branch of said Road to and through the respective points—Eatonton, Greensborough and Madison, or Athens, respectively, according to circumstances, as they may choose—and said stockholders so electing and determining as aforesaid, shall be known, according to the Branch to which they shall respectively attach themselves, by the corporate name and style of the Eatonton Railroad, Greensborough and Madison Railroad, or the Athens Railroad. And said Branch Companies, so named, shall and may apply the residue of their stock, unpaid or unapplied at said time of diverging, to the separate and sole use and construction of the Branch to which each may be attached, and shall and may have, use and enjoy, all the rents, issues and profits of said Branch, to which they may be attached, to the sole use, benefit and behoof of themselves, their heirs and assigns, for the time heretofore limited to said Union Company, and according to the provisions of this Act. They shall in no way be liable to each other as separate Companies, for the expenses or repairs of their respective Roads, nor in any way responsible for each other's acts, from and after the time and place of disunion or dirverging, designated aforesaid, so long as they may remain and exist as separate

Companies. The stockholders in the Union Road, to the point of dirverging, shall, nevertheless, exist as one corporate body, and be liable as such that far, and receive the benefits of said Union Road to said point, according to the provisions hereinbefore contained: Provided, That nothing herein contained shall prevent said Branch Companies from uniting their interests and efforts, as circumstances mutually moving them may suggest.

25. Sec. 25. That whenever any person shall own land on both sides of said railroad, at any point, the Company shall be bound to suffer such owner to construct, for his own convenience, such roads or bridges across the said Railroad or its branches as may not obstruct or incommode the passage on or along the Railroad.

AMENDMENT of the 18th December, 1835, changing the name of the Corporation, and conferring Banking powers and privileges on it. [Accepted by the Stockholders in Convention, January 12, 1836.]

Whereas, The people of the West have in contemplation to make a communication between the City of Cincinnati and the Southern Atlantic coast by means of a Railroad; and whereas the best route for said communication is believed to be through the State of Georgia; and whereas, the building of the Georgia Railroad is now in progress, and will be an important link in the line of said communication.

26. Sec. 1. Be it, therefore, enacted, etc., That the stockholders of the Georgia Railroad Company, and such other persons as shall take stock under this Act, and their successors and assigns, shall hereafter be a body corporate by the name and style of the Georgia Railroad and Banking Company, and by the said corporate name shall be, and are hereby made able and capable in law, to have, purchase, receive, possess, enjoy and retain, to them and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects, of whatsoever kind, nature or quality the same may be, sufficient for the construction of banking houses, and the erection of the Railroad only, and the same to sell, grant, demise, alien or dispose of; to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended in courts of record, and also to make and have a common seal, and the same to break, alter or renew, at their pleasure, and also, by and through the Board of Directors, to ordain, establish and put in execution such by-laws, rules and regulations as shall be necessary and convenient for the governing of said corporation, as to them may or shall appertain; Provided, That such by-laws, rules and regulations shall not be contrary to the Laws and Constitution of this State or of the United States, nor to the rules, regulations, restrictions and limitations prescribed in this Act.

27. Sec. 2. Be it further enacted, That the stock of said Company shall consist of two millions dollars, one fourth of which, applied to banking purposes, shall be gold or silver coin, in shares of one

hundred dollars each; of which capital one-half may be used for banking purposes, and not more, until the completion of the road to Athens, and one of the Southern branches through Greensborough, to be designated by a vote of the stockholders; at which time any capital stock unemployed may be used for banking purposes; Provided, however, That the continuation of said road beyond Athens, so as to connect with the Cincinnati road, shall be steadily prosecuted so soon as the Company shall have satisfactory evidence that the said connection can be formed.

28. Sec. 3. And be it further enacted, That the Directors of the Georgia Railroad Company, for the time being, shall have power at their discretion to open books of subscription at such times and places as they may think proper, giving such notice in one or more of the public gazettes of this State, as they may deem necessary, for additional subscriptions to the capital stock of said Georgia Railroad and Banking Company; on which subscriptions there shall be required to be paid, at the time of subscribing, the amount per share that may be prescribed by the Directors aforesaid; and that the President and Directors of the Georgia Railroad Company, for the time being, shall be the President and Directors of the new corporation until the time fixed for the annual election next thereafter.

29, Sec. 4. And be it further enacted, That the Board of Directors of the said corporation shall have power at its discretion to establish agencies for carrying on said work, and may have branches of its banking powers, not exceeding three, and at such times as to them may seem expedient: Provided, That no branch for banking purposes shall be established or located in any incorporated town without the consent of the corporate authorities thereof first obtained for that purpose.

30. Sec. 5. And be it further enacted, That the Directors aforesaid shall have power to open books for the subscription of stock, from time to time, until the capital stock shall be filled up; and that all further instalments on the stock herein provided to be subscribed for, shall be called for and paid in according to the provisions of the Act of which this is an amendment, and shall be under the same liabilities in case of failure to pay.

31. Sec. 6. And be it further enacted, That the bills obligatory and of credit, notes, and other contracts whatsoever, in behalf of the said corporation, shall be binding and obligatory on the said corporation: Provided, The same be signed by the President and countersigned by the Cashier of the said Company; and the funds of the corporation shall, in no case, be held liable for any contract or engagement whatsoever, unless the same shall be so signed and countersigned, as aforesaid, except for such checks or bills of exchange as shall be made or endorsed by the Cashier or President thereof, in the course of the business of said Company, and except for such contracts as shall be made under the authority of the Board for work done on the Road; and the funds of the corporation shall, at all times, be subject to the

inspection of the Board of Directors and Stockholders, when convened, according to the provisions of this Act, and of the Act of which this is an amendment.

32. Sec. 7. And be it further enacted, That the said corporation shall not, at any time, suspend or refuse payment in gold or silver coin, or any of the notes, bills or obligations, and if the said corporation shall, at any time, refuse or neglect to pay, on demand, any bill, note or obligation, issued by the corporation according to the contract, promise or undertaking, therein expressed, to the person or persons entitled to receive the same, then, and in every such case, the holder of such note, bill or obligation, shall respectively be entitled to receive and recover interest on the same, until the same shall be fully paid and satisfied, at the rate of ten per cent. per annum, together with the lawful interest thereon, from the time of such demand as aforesaid.

33. Sec. 8. And be it further enacted, That the following rules, regulations, limitations and provisions, shall form and be the fundamental articles of the said corporation :

Rule I. The number of votes to which each stockholder shall be entitled, shall be according to the provisions of the 7th section of the Act of which this is an amendment.

II. The Cashier and other officers of the banking department of said corporation (the President excepted), shall, before they enter upon the duties of their offices respectively, give bond for the faithful performance of their duties, with such security as may be required by the Board of Directors.

III. The total amount of debts which the said corporation shall, at any time, owe, whether by bill, bond, note, or other contract, shall not exceed three times the amount of capital stock actually paid in, and set apart for banking purposes.

IV. Dividends of the net profits of the stock used in banking purposes, or of so much thereof as may be prudent, shall be declared and paid half yearly, if the condition of the Company warrant it, until the Road shall yield a profit, when and in which case, that profit may also in like manner be divided ; and such dividend shall, from time to time, be determined by a majority of Directors, at a meeting to be held for that purpose, and shall, in no case, exceed the amount of the net profits actually acquired by the corporation, so that the capital stock thereof shall never be impaired.

V. The Directors shall cause to be kept fair and regular entries in a book to be provided for that purpose, of their proceedings ; and on any question, when any one Director shall require it, the yeas and nays of the Directors voting shall be recorded in such book, and the minutes be at all times, on demand, produced to the stockholders, at their general meeting.

VI. So soon as fifty per cent. of the stock already subscribed, and of the stock which may hereafter be taken in the said Company, shall have been paid in, the Company shall have the power and privilege, and not till then, of commencing banking operations, and

for that purpose shall have the power to prepare and issue notes, signed by the President and countersigned by the Cashier, as in the usual course of banks in such cases: Provided, That of the sum so received, one-half shall be set apart for their said banking operations, and the other half to the building of the Road, and so on in the like ratio as to all further instalments which may thereafter be called in.

VII. That portion of the capital stock hereinbefore provided for, and set apart for the purpose of building the Road, shall in no wise be diverted from that object, except as provided for in the second section of this Act.

34. Sec. 9. And be it further enacted, That the President and Directors of the Company shall be eleeted annually, as provided for in the Act to which this is an amendment; and the Board or Directors of the said corporation shall have power to appoint a Cashier and such other officers as may be necessary for the transaction of the banking business herein provided for, and to allow them reasonable compensation for their services; and shall be capable of exercising all such powers and authorities for the well governing and ordering of the affairs of said corporation as to them shall seem best calculated to promote the best interest of the Company.

35. Sec. 10. And be it further enacted, That the principal office of said Company shall be located at Athens, and all elections and meetings of the stockholders shall be held at such principal office, except when otherwise ordered by the Directors on special occasions.*

36. Sec. 11. And be it further enacted, That the Union Railroad, as authorized by the first session of the Act to which this is an amendment, shall be completed within four years from the passage of this Act; and the Branch to Athens, and one of the southern Branches through Greensborough, which shall be designated by a vote of the stockholders, shall be completed within six years after the passage of this Act; and on failure thereof, the banking privileges hereby granted shall be thenceforth forfeited, and all banking operations shall thenceforward, in such event, be made to cease and determine.

37. Sec. 12. And be it further enacted, That the banking privileges hereby granted shall be and continue for and during the term of twenty-five years, to be computed from the time fixed by this Act for the completion of the Union Road.

38. Sec. 13. And be it further enacted, That the Act to which this is an amendment shall be and remain in full force and effect, in every section and clause thereof, except where it conflicts with the provisions of this Act.

39. Sec. 14. And be it further enacted, That all the acts done and contracts made by the Georgia Railroad Company are hereby declared to be of binding efficacy on the Georgia Railroad and Banking Company; and all the rights to property acquired by the Georgia Railroad Company, of whatsoever nature or kind the same may be, shall pass to and be vested in the Georgia Railroad and Banking

*Repealed—See No. 52.

Company as fully and completely as they were vested in the said Georgia Railroad Company.

40. Sec. 15. And be it further enacted, That the persons and property of the stockholders for the time being, of the said Georgia Railroad and Banking Company, shall be pledged and bound in proportion to the amount of shares held by each, for the ultimate redemption of the bills or notes issued by and from said Company, in the same manner as in common commercial cases or simple actions of debt.

41. Sec. 16. And be it further enacted by the authority aforesaid, That no exclusive privilege or right of road, extended to the corporation by the Act of which this is an amendatory, shall prevent the State from granting a charter to any Company that may hereafter apply for a railroad to run from Macon to the Tennessee State line; and from granting any charter or charters to construct any Road to cross said Road, at any point west of Eatonton, or Madison, or Athens.

42. Sec. 17. And be it further enacted, etc., That no foreigner, either directly or indirectly, shall own stock in the said Railroad or Bank, and if any foreigner shall own stock in any wise, the same shall be forfeited to the State.*

AMENDMENT of the 26th December, 1836. [Accepted by the Stockholders in Convention, January 28th, 1837.]

44. Sec. 1. Be it enacted, etc., That from and after the passing of this Act, the eleventh section of an Act approved the twenty first day of December, 1833, to incorporate the Georgia Railroad Company, etc., be and the same is hereby repealed, and that in all cases in which disagreement may exist, or may hereafter arise, between individuals or incorporations, and the Georgia Railroad and Banking Company, as to the right of way or damages to property, the disagreement shall be settled as prescribed in the fifteenth section of an Act to amend the Act incorporating the Central Railroad and Canal Company of Georgia, apprloved the 14th day of December, 1835.

45. [The fifteenth section of the charter of the Central Railroad and Canal Company, thus engrafted on the charter of the Georgia Railroad and Banking Company, is in the following words: That when any person shall feel himself aggrieved or injured by the said Railroad being cut or carried through his land, or by the use of lumber or other materials from any lands in the neighborhood of said road, or by any other works of the Company, or when the said Company cannot agree with any person through or on whose land the said railway or appendages shall be conducted, or from whose lands timber or other material shall be taken for the use of the said road, as to the damage sustained, the amount of such damage or injury shall be ascertained and determined by the written award of three sworn appraisers, all of

*Repealed—See No. 49.

whom shall be disinterested freeholders of the county where the land in dispute lies; to be chosen, one by the Company, one by such owner, if he shall think proper, and one by the Inferior Court of the county where such land lies, or by any three of the Justices of said Court in vacation; but if such owner shall decline to appoint an appraiser, then two to be appointed by the Inferior Court, or three Justices thereof in vacation as aforesaid, and one by the said. Company, the award of whom, in writing, shall operate as a judgment for the amount against the Company, and shall be enforced by an execution from the Inferior Court, with the right of appeal to either party, to be tried by speeial jury at the next term thereafter of the Superior Court of said county, and the decision shall vest in the Company the fee simple of the land in question, and in the other party a judgment for its value thus ascertained, which may be enforced by the ordinary process of said court. In making the said valuation the appraisers, and in case of appeal, the Court of appeal shall take into consideration the loss or damage which may occur to the owner or owners in consequence, of the land being taken, or the right of way obstructed, and also the benefit and advantage he, she or they may receive from the erection and establishment of the Railroad or works, and shall state particularly the nature and amount of each and the excess of loss and damage over and above the benefit and advantage, shall form the measure and valuation of the said land or right of way: Provided, That no difference or disagreement between the Company and any landholder shall operate by injunction or otherwise to suspend the progress of said work, for the same shall in all cases be continued without interruption, on adequate security being given by said Company to the landholder to pay such damages as shall be assessed in manner aforesaid: And provided, also, That it do not interfere with the house, mill, or other building, or yard enclosure of individuals: Provided, That nothing in the above section shall be so construed as to authorize the appraisers to make an estimate or valuation by which the landholder shall become indebted to the incorporation: Provided, That five days notice shall be given to the owner of such land of the time and place of trial.]

APPENDIX Bi

Extracts from Act of October 14, 1879.

Section V. *Duty of Commissioners.* The commissioners appointed as hereinbefore provided shall, as provided in the next section, make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads thereof; shall make reasonable and just rules and regulations, to be observed by all railroad companies doing business in this State, as to charges at any and all points, for the necessary handling and delivering of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroads in this State; shall make reasonable and just rates of charges for use of railroad cars carrying any and all kinds of freight and passengers on said railroads, no matter by whom owned or carried; and shall make just and reasonable rules and regulations, to be observed by said railroad companies on said railroads, to prevent the giving and paying any rebate or *bonus*, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers: *Provided*, That nothing in this article contained shall be taken as in any manner abridging or controlling the rates for freight charged by any railroad company in this State for carrying freight which comes from or goes beyond the boundaries of the State, and on which freight less than local rates on any railroad carrying the same are charged by such railroad, but said railroad companies shall possess the same power and right to charge such rates for carrying such freights as they possessed before the 14th of October, 1879, and said commissioners shall have full power by rules and regulations to designate and fix the difference in rates of freight and passenger transportation, to be allowed for longer and shorter distances on the same or different railroads, and to ascertain what shall be the limits of longer or shorter distances.

Section VI. *Commissioners shall make schedule of rates.* The said railroad commissioners are hereby authorized and required to make for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads; and said schedule shall, in suits brought against any such railroad corporations, wherein is involved the charges of any such railroad corporations for transportion of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads; and said commissioners shall, from time to time, and as often as circumstances may require change and revise said schedules. When any

schedule shall have been made or revised, as aforesaid, it shall be the duty of said commissioners to cause publication thereof to be made for four successive weeks in some public newspaper published in the cities of Atlanta, Augusta, Albany, Savannah, Macon, Rome and Columbus, in this State; and after the same shall be so published, it shall be the duty of all such railroad companies to post, at all their respective stations, in a conspicuous place, a copy of said schedule for the protection of the people; *Provided*, That the schedules thus prepared shall not be taken as evidence, as herein provided, until schedules shall have been prepared and published as aforesaid, for all the railroad companies now organized under the laws of this State, or that may be organized at the time of said publication. All such schedules purporting to be printed and published as aforesaid, shall be received and held in all such suits as *prima facie* the schedules of said commissioners, without further proof than the production of the schedules desired to be used as evidence, with a certificate of the Railroad Commission that the same is a true copy of the schedule prepared by them for the railroad company or corporation therein named, and that the same has been duly published as required by law, stating the name of the paper in which the same was published, together with the date and place of said publication.

Section IX. *Penalty for violation of rules.* If any railroad company doing business in this State, by its agents or employes, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal officer thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than one thousand dollars, nor more than five thousand dollars, to be fixed by the presiding Judge. An action for the recovery of such penalty shall lie in any county in the State where such violation has occurred, or wrong has been perpetrated, and shall be in the name of the State of Georgia. The commissioners shall institute such action through the Attorney General or Solicitor General, whose fees shall be the same as now provided by law.

Section X. *Injuries resulting from violation of rules.* If any railroad company doing business in this State shall, in violation of any rule or regulation provided by the commissioners aforesaid, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, in the county where the same was done, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in actions between individuals, except that in cases of wilful violation of law, such railroad companies shall be liable to exemplary damages: *Prorided*, That all suits under this Article shall be brought within twelve months after the commission of the alleged wrong or injury.

APPENDIX C.

Opinion of Supreme Court in Former Case on Application for Injunction.

GEORGIA RAILROAD ET AL.,

vs.

SMITH ET AL.,

RAILROAD COMMISSIONERS, ET AL.

By the Court—Crawford, J., delivering the opinion.

The Georgia Railroad and Banking Company, denying the power of the Railroad Commission of the State of Georgia to regulate freight and passenger tariffs over its road, has filed this Bill that the right of the said Commission to exercise this power may be judicially determined. This power is denied:

(1.) Because, by Article 4, Section 2, Paragraph 1, of the Constitution of Georgia, the duty is imposed on the General Assembly to regulate freight and passenger tariffs.

(2.) Because the Act of October, 14, 1879, is unconstitutional and void, as being an attempt to delegate legislative powers to said Railroad Commission. And because it is in conflict with the Constitution of Georgia, which forbids the imposing of excessive fines, or inflicting unusual punishments.

(3.) Because the charter of said Company is a contract between the State and the Company, by which the Company has the right to charge any rates of freight and passenger tariffs not exceeding those limited by its charter; whereas the said Commission, under the authority given it by the Act of October 14, 1879, forbids the said Company, under heavy penalties, from charging the rates allowed by said contract. Wherefore the said Act is, by virtue of Paragraph 1, Section 10, Article 1, of the Constitution of the United States, which prohibits the States from passing any law impairing the obligations of a contract, unconstitutional, null and void.

The prayer of the Bill is: (1) That the Act of October 14, 1879, be declared null and void; (2) That it be declared inoperative against The Georgia Railroad and Banking Companp; (3) That the said Commission be perpetually enjoined from prescribing rates of fare

and freight over the Georgia Railroad and its branches, or in any manner enforcing against it the provisions of the said Act of October 14, 1879; (4) For general relief.

The Chancellor below, after considering the Bill and Exhibit of Complainants, and cross Bill and Exhibits of Defendants, refused the injunction prayed for, and that refusal is assigned as error.

The questions to be determined by this litigation are:

(1.) Whether the Act establishing the Railroad Commission of the State of Georgia, with its powers and duties, is not unconstitutional and void, because it is the duty of the Legislature, under the Constitution, to regulate freight and passenger tariffs, and this Act seeks to delegate this power to the said Commission.

(2.) Whether the said Act, in so far as it attempts to interfere with the chartered rights of the Georgia Railroad and Banking Company, does not violate that clause of the Constitution of the United States, which prohibits the States from passing laws impairing the obligations of contracts.

1. The Constitution of 1877 confers upon the Legislature the power and authority of regulating railroad freight and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs. It further makes it the duty of the Legislature to pass laws, from time to time, to carry into effect this constitutional provision, and to enforce the same by adequate penalties.

For this purpose and to this end was the Act under consideration passed. It declares, among other things, substantially that, if any railroad doing business in this State, shall charge, collect, demand, or receive, more than a fair and reasonable toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, the same shall be deemed guilty of extortion, and upon conviction, dealt with as by said Act provided.

In order that fair and reasonable tolls, or compensation, for the transportation of passengers and freight, might be certainly had, it was also provided that there should be three railroad commissioners appointed, whose duty it should be to make reasonable and just rates of freight and passenger tariffs, to be observed by all the railroad companies doing business in the State on the railroads thereof. And that a schedule of such rate should be made for each railroad doing business in the State, which said schedule should be deemed and taken in all the courts of the State, as sufficient evidence that the rates were just and reasonable charges for the transportation of passengers and freights and cars upon the railroads, in all cases brought against any road involving unjust discriminations or improper charges. Adequate penalties were likewise provided for the

enforcement of the rules and regulations of the said Commission for the establishing of reasonable and just rates to be observed by the railroad companies.

Thus it appears that the Constitution provided that the Legislature should have power to regulate the railroad freights and passenger tariffs, and to requre reasonable and just rates for both; that it made it also the duty of the Legislarure to pass laws necessary for its execution; and that, in pursuance of that duty the law complained of was passed.

The object of the constitutional provision and the legislative enactment was to give proper protection to the citizens against unjust rates for the transportion of freight and passengers over the railroads of the State, and to prevent unjust discriminations, even though the rates might be just. It was not expected that the Legislature should do more than pass laws to accomplish the ends in view. When this was done, its duty had been discharged. All laws are carried into execution by means of officers appointed for that purpose; some with more, others with less, but all must be clothed with power sufficient for the effectual execution of the laws to be enforced.

Legislative grants of power to the officers of the law to make rules and regulations which are to have the force and effect of laws, are by no means uncommon in the history of our legislation. I need only mention the power given to the Judges of the Supreme and Superior Courts of this State to establish rules which, if not in conflict witn the Constitution of the United States, of this State, or the laws thereof, are binding and must be obeyed. And it has never been claimed that they were unconstitutional because they had not been passed by the Legislature and read three times, and on three separate days, in each house of the General Assembly.

The Act of October 14, 1879, provides that fair and reasonable rates only shall be charged by the railroads of the State. Did the Constitutional Convention, by Paragraph 1, Section 2, Article 4, intend more than the passage of a general law, such as this, to carry into effect the clause here referred to? It certainly was not contemplated that the details of rates to be fixed over the many miles of railway in the State, should be settled and determined by the Legislature. The many influences that combine to cause changes in the ever varying vicissitudes of trade and travel were neither overlooked nor forgotten by that body. The utter impossibility of preparing by the Legislature just proper and schedules for the various railroads, with their differences of length, locality and business, appears to us to be so clear and manifest as that to have entertained it would have been absolutely absurd. And especially so, when it is remembered that schedules just and right, where arranged for the months of winter, might be ruinously unjust and wrong for the monts of summer; or that such as were proper for the year of the meeting of the General Assembly might the succeeding year well nigh bankrupt every railroad corporation in the State.

In our judgment, the Act creating the Railroad Commission is not unconstitutional and void. That it may need amendments is most probable; indeed, an experiment so new and untried would be exceptional if it were perfect in its very inception. The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed, is apparent and strikingly great, and this we understand to be the distinction recognized by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional, whilst the latter would not. 91 Ill. Rep., 357; Tilly vs. Savannah, Florida and Western Railroad Company, and cases cited. (Circuit Court U. S., Southern District of Ga., Woods, J.) See Pamphlet Dec. Supreme Court of Ga., September, 1880; 94 U. S. Rep., 113, 155, 164.

2. The next question made by the record is, whether the Act of October 14, 1879, violated the chartered rights of the stockholders of the Georgia Railroad and Banking Company, as contained in the 12th Section of the Act of Incorporation. That clause is as follows:

"That the said Georgia Railroad Company shall at all times have exclusive right of transportation or conveyance of persons, merchandise and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right: provided that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles and ten cents per cubic foot on articles of measurement, for every one hundred miles, and five cents per mile for every passenger: provided always, that the said Company may, when they see fit, rent or farm out all or any part of their said exclusive right of transportation or conveyance of persons on the railroad or railroads with the privilege to any individual, or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned."

Acts of 1833, page 262.

It is well settled that the charters of incorporated companies granting exclusive privileges to the corporators are always to be strictly construed, and whatever is not expressly given therein, or not necessarily implied therefrom, is withheld. In support of this rule of law, we quote from the case of Commonwealth vs. Erie and Northeast Railroad Company, 27 Pa. St. Rep., 339. Black, Chief Justice, in rendering the judgment of the Court, said:

"That which a Company is authorized to do by its Act of incorporation, it may do; beyond that all its acts are illegal. And the power must be given in plain words or by necessary implication. All powers not given in this direct and

unmistakable manner are withheld. In such cases ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the Legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist, because, whatever is doubtful is decisively certain against the corporation."

And again is the rule clearly and forcibly stated in the case of Fertilizer Company vs. Hyde Park, 97 U. S., 659, Swayne, Justice, said:

"The rule of construction in this class of cases is that it shall be construed more strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court."

Guided by these authorities, let us see whether the 12th Section of this charter can stand the test prescribed and give to the Company what it claims. It was incorporated "to construct a rail or turnpike road," and after providing for its organization, conferring upon it the right to cross the public roads and bridge the rivers and water courses, and giving it the right of way, etc. The Act then proceeds to declare the special rights to be enjoyed. These were, that the Company should "at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right."

The exclusive right here granted was to be enjoyed only upon one condition, and that was, that the Company should not charge more than fifty cents per hundred pounds per hundred miles on heavy freight, and five cents a mile for every passenger transported over the road. The Legislature was dealing with the subject matter of a public highway, and public highways had theretofore been opened to the free use of all persons for travel, for the transportation of goods and the conveyance of passengers without the payment of tolls or charges. To deny the use of a public highway to the people at large and give it to an incorporated company, for its exclusive use to convey passengers and freights, was deemed an extraordinary privilege; and this extraordinary privilege the Legislature agreed to grant to this Company, provided it would not charge more than the above rates. Or to put it in the form of contract, it was agreed by the State that this Company might build the road, and so long as it carried freight and passengers as prescribed by its charter, it should not in any wise be used by the public, but by the Company exclusively.

Under no reasonable construction of this charter can it be claimed that the State contracted with this Company to guarantee to it the exclusive right to charge the full amount of the maximum rates, or indeed any rate, so long as it did not exceed them. It can only be construed to mean, that so long as the specified maximum of rates was not exceeded, the Company or its lessees should have the exclusive right to carry freights and passengers over the road. This seems to us to be the unquestionable meaning of the words used, but even if this be doubtful, "whatever is doubtful is decisively certain against the corporation."

Besides, we hardly think it will be denied that the State has the power to regulate the rates of freight and passenger fare upon railroads, unless that right has been clearly parted with in granting the charters. Indeed, the words of the charter parting with this right of the State, must amount to a positive contract. In the case of the Charles River Bridge Company vs. Warren Bridge Company et al., 11 Pet., 544, C. J. Taney, in producing the judgment of the Court, said, that it was "necessary to show that the Legislature contracted not to do the act of which complaint is made. The inquiry then is, does the charter contain such a contract upon the part of the State? Is there any such stipulation to be found in the instrument? If a contract on that subject can be gathered from the charter it must be by implication, and cannot be found in the words. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description no rights are taken from the public, or given to the corporation, beyond those which the words of the charter by their natural and proper construction, purport to convey. There are no words which import such a contract, and none can be implied." See also 49 Ga., 151; 50 Id. 620; 40 England C. L., 298, 319; 42 Id., 496; 46 Id., 234–5.

Applying these rules of law to the charter under consideration, can it be said that there is a clear contract, either expressed or necessarily implied, that the Company shall have the absolute right to regulate its freights and fares, and that the State will guarantee to them that right up to the maximum sum named in the charter; such a contract cannot be found in the words, and "in charters of this description no rights are to be taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey."

The natural construction of the words used is that the State stipulates, upon certain terms, not to interfere with the Company's exclusive right of transportation. This was all. It is nowhere stipulated not to interfere with its rates. And to bind the State, it must be shown that she contracted with the Company that it would not thus interfere. Let us inquire, then, how does the Act complained of deprive the Railroad of its exclusive right to convey passengers or freight? By what paragraph therein is the road open to the public? The answers are obvious; there is not a line to be

found in it that deprives the corporators of the exclusive use of the road as against everybody. Hence the learned and able counsel for the Railroad, to maintain their position, were compelled, in their construction, to insist that the word exclusive, in the 12th Section of the Charter, should be stricken out, or at least that no special significance should be given to it. Where, we ask, is there authority in any court, when construing the grant of chartered law and power to a corporation, to strike out or weaken the force of any words whatever, so as to enlarge in meaning or cover what it would not cover if it remained therein? We know of no such authority, and none such has been, or can be, shown for this.

It is claimed by the Company that the proviso makes the contract between it and the State. But before this can be construed into a contract such as contended for, it would be necessary to insert words therein that are not used, and and to make that a covenant in which no of words covenant appear. The construction contended for is, we think, unauthorized and violative of the rules as to what constitutes the usual office of proviso. See 15 Peters, 423; 1 Barn. and Add., 99; Comyn's Dig., "Condition" (A2), Vol. 3; Coke on Littleton, 203 (B); Bouvier's Law Dic., "proviso," 399.

It may not be out of place, in concluding this opinion, to say that, whilst we hold the Act of October 14, 1879, constitutional and the orders of the Commissioners valid and binding, yet we are not to be understood as holding that their powers are unlimited or beyond legal control by the proper authorities of the State. On the contrary, we hold that the powers which have been confered upon them are to be exercised within legal and constitutional limitations, and in such way as not to invade the legal and constitutional rights of others. If, therefore, the case made by the complainant against the Commissioners had shown a violation of the chartered right of the Company, it would have been the duty of this Court, by proper order and decree, to have restrained and enjoined them from such violation. All grants of power are to be exercised only in conformity to the Constitution of the State and Federal Government and the laws passed in pursuance thereof. Judgment affirmed.

Hall, Justice, stated that he concurred in the judgment of the Court, but could not concur with the other members thereof fully in construing Section 12 of the Charter of The Georgia Railroad, and would, therefore, concur *dubitante* as to the last point. He preferred not to dissent, as the case would, under the announcement of counsel, be carried to the Supreme Court of the United States, and he considered it better to have the question reviewed on the judgment of a full bench.

Office Supreme Court U. S.
FILED.
APR 17 1888
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 284.

THE GEORGIA RAILROAD & BANKING COMPANY,

PLAINTIFF IN ERROR,

vs.

James M. Smith, Campbell Wallace and Leander N. Trammell, Railroad Commissioners of Georgia, and Clifford Anderson, Attorney-General of Georgia.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

Can the Legislature Reduce the Maximum Rates Specified in the Irrepealable Charter of a Railroad Company?

ARGUMENT.

ED. BAXTER,
Of Counsel for Plaintiff in Error.

PART I.

STATEMENT OF CASE.

SEC. 1. The Plaintiff in Error, The Georgia Railroad and Banking Company, was incorporated by a public act of the Legislature of Georgia, assented to December 27th, 1833, under the name of "The Georgia Railroad Company," with the power to construct a railroad or railroads, as in said act set forth.

By an act of said Legislature, approved December 18th, 1835, certain amendments were made to the charter of said company, by one of which amendments, the corporate name was changed from "The Georgia Railroad Company" to "The Georgia Railroad and Banking Company."

(*Transcript, top pp.* 21, 22.)

SEC. 2. The twelfth section of said charter contained the following provision, viz.: "The said Georgia Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandise, and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right; *Provided*, that the charge of transportation or conveyance, shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles, and five cents per mile for every passenger; *Provided, always*, that the said company may, when they see fit, rent or farm

out all, or any part, of their said exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned."

(*Transcript, top p.* 22.)

SEC. 3. In pursuance of the authority granted in said twelfth section, said company, on May 7th, 1881, by written instrument, rented and farmed out to William M. Wadley, for the term of ninety-nine years, from April 1st, 1881, "all its privileges, general and exclusive, of transporting persons, merchandise, produce, and every kind of property whatsoever, which is or may become the subject of railroad transportation, over the lines of railroad owned or controlled (by said company) to the full extent that (said company) has and enjoys, or is now entitled to have and enjoy, or may hereafter acquire the right to have and enjoy such privileges, and subject to all the obligations and duties imposed by its charter in this behalf (upon said company)."

(*Transcript, top p.* 25.)

The said company also rented and farmed out to said Wadley, for the term aforesaid, all the railroads and branches belonging to said company, "together with the rights of way, road-beds, depots, stations, warehouses, elevators, work-shops, wells, cisterns, water-tanks, and other appurtenances of said railroads and branches."

(*Transcript, top p.* 25.)

The said Wadley covenanted to pay the taxes upon the property and franchises farmed out to him (*Transcript, top p.* 27), and to return said property in as good condi-

tion as it was in at the date of said instrument. He covenanted to keep said railroads and their appurtenances and the means of transportation in first-class condition, and to indemnify said company against any damages, losses, or liabilities by reason of the operating of said railroads. He also covenanted that the privileges of free passage to the stockholders and directors of said company shall be continued to the same extent as they were then enjoyed, according to the then usages of said company.

(*Transcript, top p.* 28.)

Said instrument stipulated that nothing therein contained should be construed as giving to said Wadley the right to do, or omit, any act, or thing, the doing, or omission of which, would furnish a ground of forfeiture of the charter of said company, and all such acts and omissions were declared to be contrary to the terms and spirit of said instrument and void.

(*Transcript, top p.* 29.)

Said company reserved the right to enter upon, and inspect said railroads and appurtenances, including the rolling stock used thereon, as often as said company may think proper; and "in addition to all other remedies" then usual, or thereafter to become usual in the law, said company reserved the right to enter upon and resume possession and enjoyment of all its property for the breach of any of the covenants or agreements of said instrument.

(*Transcript, top p.* 29.)

SEC. 4. It is assumed that since the execution of said instrument the following legal status exists, viz.: That said company owns the right in perpetuity, to transport persons and property over its lines of railroads, and to charge

therefor the rates specified in said twelfth section of its charter; that said Wadley, or his legal representative, enjoys that right at present, and will enjoy it for the term limited in said instrument, unless it is sooner surrendered or forfeited; but that, notwithstanding said instrument, said company remains liable to the public, and to those whose persons and property are transported over said railroads, for any breach or failure of duty, in and about the operation, and management of said railroads.

SEC. 5. The Legislature of the State of Georgia passed an act, approved October 14th, 1879, entitled "An act to provide for the regulation of railroad freight and passenger tariffs in this State;" to "prevent unjust discrimination, and extortion, in the rates charged for transportation of passengers and freight, and to prohibit railroad companies, corporations, and lessees in this State, from charging other than just and reasonable rates, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to appoint commissioners, and to prescribe their powers and duties in relation to the same."

In pursuance of said act, three of the Defendants in Error were constituted a Board of Commissioners, known as "The Railroad Commission," and they have assumed to prescribe rates of freight and passenger tariffs less than the maximum of those prescribed in said twelfth section of said company's charter, and they have assumed to make said rates binding upon said company, and upon the legal representative of said Wadley; and said Commission, by a certain circular dated October 27th, 1882, and designated as "No. 31," have prescribed rates of freight, which are far below the rates which said company is allowed by said twelfth section of its charter to charge.

(*Transcript, top p.* 23.)

SEC. 6. On the 23d of November, 1882, said company and William O. Wadley, executor of said William M. Wadley, filed their original bill in the Superior Court of Fulton County, Georgia, against said Railroad Commissioners, and the Attorney-General of the State of Georgia, insisting that said Act of October 14th, 1879, and said Circular No. 31, issued in pursuance of said act, were violative of certain provisions of the Constitution of the State of Georgia; that the charter of said company was a contract between the State of Georgia and said company; that by said contract said company has the right to charge any rates of freight and passenger tariffs, not exceeding, those limited in said twelfth section of said charter; and that said Act of October 14th, 1879, and said Circular No. 31, forbid the Complainants, under heavy penalties, from charging the rates allowed by said contract—wherefore said act of the Legislature is, by virtue of Paragraph 1, Section 10, of Article I., of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of a contract, null and void.

(*Transcript, top pp.* 23, 24.)

SEC. 7. The said Act of October 14th, 1879, fixes a penalty, of not less than $1,000, and not more than $5,000, for each violation of the rules of said Commission, and Complainants averred, that to attempt to assert, what they believed to be, their rights, in advance of the judicial declaration of those rights, would involve Complainants in irreparable loss and injury, and subject them to a multiplicity of suits, for which they could have no adequate remedy, save by the writ of injunction. The bill prayed that said Act of October 14th, 1879, be declared null and void, and inoperative against Complainants; that said Commission be perpetually enjoined from prescribing rates of fare and freight over said Georgia Railroad, and its branches,

or in any manner enforcing the provisions of said Act of October 14th, 1879, and especially said Circular No. 31; that the Attorney-General of Georgia be restrained from instituting any suit of any sort against Complainants, or either of them, for the purpose of enforcing the provisions of said act; and for general relief.

(*Transcript, top p.* 24.)

SEC. 8. The Defendants demurred to said bill, assigning as causes of demurrer—

First—That Complainants had not by their said bill, made such a case, as entitled them in a court of equity, to the relief prayed for therein.

Second—That there is no equity in said bill.

Third—That Complainants have a full, adequate, and complete remedy at law, for the alleged grievances complained of in their bill.

(*Transcript, top p.* 33.)

On the —— day of May, 1883, the said Superior Court of Fulton County, "ordered and adjudged that said demurrer be, and the same is, sustained, and that said bill is dismissed, at the cost of Complainants," etc.

(*Transcript, top p.* 20.)

The Complainants presented their bill of exceptions, containing an assignment of the following errors as committed by said Superior Court, viz.:

First—In sustaining the demurrer to the bill.

Second—In deciding that there was no equity in the bill, thereby holding that said Circular No. 31 is legal and binding upon Complainants; that said Act of October 14th, 1879, is constitutional and valid, and not in conflict with the Constitution of the State of Georgia; and that said act is not in conflict with Paragraph 1, Section 10, Article I., of the Constitution of the United States, which prohibits the States from passing any act impairing the obligation of a contract.

Third—In deciding that Complainants have a full, adequate, and complete remedy at law.

(*Transcript, top p.* 34.)

The Judge of the said Superior Court certified that said bill of exceptions, contained all the evidence material to a clear understanding of the errors complained of; and he ordered the Clerk of that Court to certify a copy of the record, to the Supreme Court of Georgia, in order that the errors alleged to have been committed, might be considered and corrected. This practice in Georgia, seems to be equivalent to an appeal from a decree in equity under the English practice.

(*Transcript, top pp.* 34, 35.)

SEC. 9. The Supreme Court of Georgia adjudged "that the judgment of the Court below be affirmed"; and in a written opinion, filed in the case, the Supreme Court say, that the case was before that Court at the last preceding term, on the application for an injunction. That in denying the application for an injunction, then prayed for, it was held that there was no equity in the bill, on any of the grounds therein set out; that the judgment, of the Court below, dismissing the bill, being now before the

Supreme Court on the writ of error, "the same questions of law decided before on the application for the injunction, including the alleged violation of the Constitution of the United States, in the construction put by the Court below, and affirmed by this Court, on the twelfth section of the act incorporating the Plaintiff in Error, are the only questions now made again. The case, therefore, is *res adjudicata*, and the judgment sustaining the demurrer and dismissing the bill must be affirmed."

(*Transcript, top pp.* 35, 36.)

The Georgia Railroad and Banking Company, thereupon brought the case to this Court by writ of error, allowed by the Chief Justice of the Supreme Court of Georgia.

PART II.

ASSIGNMENT OF ERRORS.

SEC. 10. The assignment of errors filed by the Georgia Railroad and Banking Company in this Court will be found with the argument of Hon. Jos. B. Cumming, and need not be repeated.

It will be found that the principal error assigned is, that the Supreme Court of Georgia held that said Act of October 14th, 1879, and said Circular No. 31, are legal and binding on said company, and are not in conflict with Paragraph 1, Section 10, of Article I., of the Constitution of the United States, which prohibits the States from passing any act impairing the obligation of a contract.

PART III.

ARGUMENT.

SEC. 11. The main question in this case, is as to the proper construction of the following clause of the twelfth section, of the charter of the Plaintiff in Error, viz.:

"The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation, or conveyance of persons, merchandise, and produce, over the railroad, and railroads, to be by them constructed, while they see fit to exercise the exclusive right; *Provided*, that the charge of transportation, or conveyance, shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles, and five cents per mile for every passenger; *Provided, always*, that the said company may, when they see fit, rent, or farm out, all, or any part, of their said exclusive right of transportation, or conveyance of persons, on the railroad, or railroads, with the privilege to any individual, or individuals, or other company, and for such term, as may be agreed upon, subject to the rates above mentioned."

My contention is, that the Legislature intended, by the language quoted, *to fix a maximum of rates*, beyond which any charge would be unreasonable; *and to vest in the company the unrestricted right to fix the rates at which it will transport over its railroad, provided those rates shall not exceed said maximum.*

Said maximum having been fixed in the charter, became an essential part of the contract between the company and the State; and I contend that it is binding on the Courts in their adjudications, as well as on the Legislature in its exercise of the right to regulate the conduct of common carriers. I do not claim that the Legislature surrendered *all* power to regulate the affairs of said company; on the contrary, I concede that there are many police regulations which the State may adopt; that discriminations between different persons, localities, and traffics, may be prohibited; that charges in excess of the maximum rates fixed by the charter may be punished; and that the State may entrust the oversight, and supervision of the operations of the company, to a Railroad Commission, charged with the duty of guarding the public against all such abuses as the State has the right to correct.

My contention is confined to the proposition that neither the Legislature, the Courts, nor the Commission, have any power to denounce as unreasonable, rates fixed by the company, and offered impartially to all, provided, those rates do not exceed the maximum rates which the State of Georgia agreed, in the charter contract, should be inviolably regarded and accepted as reasonable.

SEC. 12. I am aware of the strict rule of construction which this Court has applied in this class of cases; and I will quote from recent decisions where the rule has been stated in the strongest terms.

It is said that "grants of immunity from legitimate governmental control, are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is *clearly* established, the Legislature

is free to act on all subjects within its general jurisdiction, as the public interests may seem to require."

108 *U. S.*, 531; *Ruggles v. Illinois.*

"The power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be, by words of positive grant, or something which is, in law, equivalent. If there is a *reasonable* doubt, it must be resolved in favor of the existence of the power."

116 *U. S.*, 325; *Stone v. Farmers' Loan and Trust Co.*

"The surrender, when claimed, must be shown by *clear, unambiguous* language, which will admit of no *reasonable* construction consistent with the restriction of the power."

116 *U. S.*, 326–7; *Stone v. Farmers' Loan and Trust Co.*

I insist, however, that it has been "*clearly* established," beyond "all *reasonable* doubt," by judicial decisions of the highest authority, that maximum rates, when fixed in a charter, are binding upon the Courts, and the Legislature; and I also insist that the language used in the charter of the Plaintiff in Error was used to fix maximum rates; that it is "*clear*," and "*unambiguous;*" and admits of no "*reasonable* construction," to the contrary.

SEC. 13. The sixth section of the charter of the Yazoo and Mississippi Railroad Company, conferred on the company, power "to fix from time to time, by its Board of Directors, the rates at which it will transport persons or property over its railroad, *provided* they shall not exceed *a maximum* specified in the act."

The Supreme Court of Mississippi state the rule of strict construction as strong as it is stated by this Court. They say: "It is only where there is *unmistakable* manifestation of a purpose to place the unrestricted right in the corporation, that the power of the Legislature afterwards to interfere, can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted, without ascribing to the Legislature an intent to part with any power, it will be done—only what is plainly parted with, is gone."

But having stated the rule of strict construction, in the strong language just quoted, the Court proceed to construe the provision of the charter above referred to, and say: "*Fixing rates in a charter, is a specification of what is reasonable*—an exclusion of tacit, or implied conditions on the subject. It is an essential part of the contract of incorporation; the most important condition of its existence; the inducing cause of its acceptance.

"*That it was the legislative intent to vest in the Appellee the unrestricted right to fix rates, within the limits prescribed by the charter*, IS CLEAR. * * * *The Appellee has the* UNQUESTIONABLE *right, from time to time, by its Board of Directors, to fix the rates at which it will transport over its railroads; provided those rates shall not exceed the maximum prescribed by the charter.* That is the contract. *These terms were* EXPRESSLY *made.* On the faith of them, capital was invested, and the enterprise set on foot."

21 *Am. and Eng. R. R. Cases, pp.* 13, 14; *Railroad Commission v. Yazoo & Mississippi R. R. Co.*

The opinion of the Supreme Court of Mississippi, was before this Court, in the case of *Stone v. Farmers' Loan and*

Trust Company, 116 U. S., 330, and the Chief Justice, after deciding that a charter which merely gave a company power to fix *reasonable rates* (*without specifying any rates or setting any limit*), did not deprive the Legislature of its power of regulation, said: "*This is not in conflict with the judgment of the Supreme Court of Mississippi*, in *Railroad Commission v. Yazoo and Mississippi Railroad Company*, in which it was decided, that the power had been surrendered in favor of that company, *because in that charter a maximum of rates was fixed.*" And upon the same page, the Chief Justice said, that in *Munn v. Illinois*, 94 U. S., 113, 134–133, and *Chicago, Burlington and Quincy Railroad Company v. Iowa*, 94 U. S., 161–2, "*this Court decided* that as to natural persons and corporations subject to legislative control, the State could, in cases like this, *fix a maximum beyond which any charge would be unreasonable*, AND THAT SUCH MAXIMUM WHEN FIXED WOULD BE BINDING ON THE COURTS IN THEIR ADJUDICATIONS, AS WELL AS ON THE PARTIES IN THEIR DEALINGS.

116 *U. S.*, 330; *Stone v. Farmers' Loan and Trust Co.*

In *G. W. Railway Company v. McCarthy*, decided by the House of Lords in 1887, reported in 29 Am. and Eng. R. R. Cases, p. 87, Lord Watson said (pp. 97–8): "The reduced rate, plus ten per cent., is proved to be within the *maximum rates* authorized by the company's special acts; *and therefore it must, in my opinion, be taken to be, in the circumstances of this case, a charge reasonable in amount.*" * * * * "I do not think a Court of law would be justified in entering upon an inquiry for the purpose of ascertaining whether the Legislature had authorized an unreasonable rate, and without such an inquiry, it would be manifestly unjust to hold that it was unreasonable."

I submit that a proposition, which has been affirmed in one case by the Supreme Court of Mississippi, in one case by the House of Lords, and in three cases by this Court, may be safely assumed to have been "*clearly* established," beyond "all *reasonable* doubt."

At all events, if such authorities are not sufficient to settle a question beyond all *reasonable* doubt, I confess I do not see how it is to be settled at all.

SEC. 14. I submit with equal confidence that the language employed in the twelfth section, quoted above, *was used for the purpose of fixing maximum rates;* that it is "*clear*" and "*unambiguous;*" and admits of no "*reasonable construction*" to the contrary.

The charter of the Yazoo and Mississippi Railroad Company, referred to above, gave that company power to fix its rates of transportation, "*provided they shall not exceed a certain maximum specified in the act.*"

The charter in this case, gives the Georgia Railroad Company the exclusive right of transportation over its railroad, "provided the rates shall not exceed" a certain maximum specified in its charter.

There is certainly no substantial difference between the two charters; and yet I have shown that the Supreme Court of Mississippi held that the language of the charter, in the case before them, gave that company the *unquestionable* right to fix its rates, provided they did not exceed the *maximum* prescribed by that charter.

If the language in that charter *unquestionably* fixed a *maximum* of rates for that company, the language in the

charter now before this Court *unquestionably fixes a maximum* for the Georgia Railroad Company.

In the case of *Knox & Gill v. South Carolina Railroad Co.*, 5 S. C. Rep., p. 22 (decided in 1873), the charter contained the following (p. 28): "That the said South Carolina Canal and Railroad Company, shall at all times have the exclusive right of transportation or conveyance of persons, merchandise, and produce, over the railroads and canals, to be by them constructed, while they see fit to exercise the exclusive right; *Provided*, that the charge of transportation or conveyance, shall not exceed thirty-five cents per one hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles, and five cents per mile, for every passenger."

The Supreme Court of South Carolina (Willard, Justice,) on p. 37, said: "But evidently it was not the intent of the statute to fix the charge for carriage as between the carrier and shipper, but merely *to prescribe a limit*, beyond which the carrier should not go, in making a contract of carriage. There is nothing in the statute in question, to distinguish it from a large class of statutes, *limiting the amount* chargeable by persons exercising callings subject to legislative regulations, and the policy of such statutes is to prevent excessive charges, but to leave the actual sums charged, *to be affected within the prescribed limits, by the economic rule of supply and demand.*"

In the case of *Bonham v. C., C. & A. R. R. Co.*, 13 Shand. (S. C.), 267 (decided in 1880), reported in 3 Am. and Eng. R. R. Cases, p. 309, the charter contained the following: "That the said company shall have the exclusive right of conveyance or transportation of persons,

goods, merchandise, and produce over the said railroad, to be by them constructed, and shall have power to charge for such transportation of persons, goods, produce, merchandise, and other articles, any sum not exceeding the following rates," viz.: On persons, not exceeding six cents per mile, etc.; for the transportation of goods, produce, merchandise, and other articles, not exceeding fifty cents per one hundred pounds, for each one hundred miles, on heavy articles, and fifteen cents per cubic foot, on articles of measurement, for every one hundred miles, etc. The Supreme Court of South Carolina (Willard, C. J.), in disposing of an argument which had been made in the case, said: "It is clear that the tendency of such a construction, as that contended for, would be to compel railroad companies to adjust their business to theoretical standards, *instead of leaving them free, within certain limits, to arrange their modes of transacting their business, according to the exigencies of the business.*

"*It is equally clear that the whole purpose of the statute* WAS TO FIX AN UPWARD LIMIT TO RAILROAD CHARGES, and not to fix a scale, by which they might be computed, with reference to a unit, common to all classes of goods. *This would leave the Company free to pursue that course that would be dictated by business necessity, or prudence, within the limits fixed by law.*"

3 *Am. and Eng. Railroad Cases, pp.* 311, 312.

The striking resemblance between the charters construed in the two last cases, and the charter of the Georgia Railroad Company, will be readily noticed.

In *Ragan & Buffet v. Aikin*, 9 Lea, 609, 610, it appeared that the charter of the R. & J. R. R. Co., directed that said company should be governed by the provisions

of the charter of the Nashville and Chattanooga Railroad Company, and the fourteenth section of the last named charter is as follows:

"The said company shall have the exclusive right of transportation, or conveyance of persons, goods, merchandise, and produce, over the said railroad by them to be constructed; *Provided*, that the charge of transportation or conveyance shall not exceed thirty-five cents per one hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles, and five cents a mile, for every passenger; *And provided, also*, that the said company, may, when they see fit, farm out their rights of transportation on said road, subject to the rates above mentioned."

See Acts Tennessee, 1845–6, *p.* 21, § 14.

It will be seen that the charter just quoted, is substantially the same as the charter of the Georgia Railroad Company, except as to the rate per one hundred pounds on heavy articles.

The Supreme Court of Tennessee, (while following the strict rule, that in the construction of charters, the benefit of the doubt, in a case of ambiguity, must be given to the public,) said: "Looking to the general intent of the act incorporating a railroad company, and giving the language of the particular clause a *reasonable* construction, *it can scarcely be doubted that the Legislature intended to confer upon the company the right to charge, as a common carrier, for freight and passengers carried over its road*, or any part of it." (9 *Lea*, *p.* 615.) * * * "THE OBJECT WAS TO FIX A MAXIMUM CHARGE" beyond which the company could not go, and to leave the tariff of charges within that limit, to the company, subject to the rules of

the common law, and the regulating power of the Courts, and the Legislature.

9 *Lea, p.* 620.

It seems to me, in view of the authorities referred to in this section, that it has been "*clearly* established" beyond "all *reasonable* doubt," that the object of the twelfth section of the charter of the Georgia Railroad Company was "*to fix a maximum*" or "*upward limit*" of rates.

SEC. 15. If we look back to the circumstances which surrounded the parties when the charter of the Georgia Railroad Company, was granted by the Legislature in 1831, we will see that there can be no *reasonable* doubt, that the twelfth section was intended "*to fix a maximum*" of rates, to be charged by said company, as a common carrier, even if we did not have the aid furnished by the authorities cited in the last two preceding sections of this argument. In construing the charter of the Union Pacific Railroad Company, in 1878, this Court said: "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience." * * * * "But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose, from the language used, in connection with the attending circumstances."

99 *U. S.*, 63, 64; *Platt v. U. P. R. R. Co.*

Again: It was said by this Court in *Siemens v. Sellers*, 123 U. S., p. 285, that while the words of a law are generally to have a controlling effect upon its construction,

"the interpretation of those words, is often to be sought from *surrounding circumstances and preceding history.*"

Recurring then to the history of railroads, and other internal improvements, preceding the year 1831, we know that the public county roads, turnpikes, canals, and rivers, had, prior to that time, furnished the only ways of internal communication, in England, and in this country. The public roads were constructed and kept in repair by the Government, and the rivers were cleared of obstructions at the public expense. The turnpikes and canals were generally constructed and kept in repair by individuals or private corporations, under charters granted by the Government, securing to the proprietors certain tolls, for the use of the turnpikes and canals.

All of those ways of internal communication, were thrown open to the public, because they were equally susceptible of general use by the public. Collisions between vehicles on roads and turnpikes seldom occurred, and were of no importance; and collisions upon rivers and canals, while more numerous, and more serious in their results, were generally easily avoided, by ordinary attention to the laws and regulations of navigation.

The first railways in England, and America, were chartered as mere tramways, upon which the cars were to be drawn by animal power; and as the danger from collisions on them was not much greater than on turnpikes and canals, they, also, were thrown open to the public for general use.

When steam was *first* suggested as a motive power for railways, it was not supposed that any very high rate of speed would be attained, and therefore, the danger from

collisions was not expected to be much greater than upon the tramways; and accordingly we find that the *earlier* charters for steam railways in England and America, gave to all persons, the right to place cars upon the railways, and to use them in the transportation of freight and passengers, upon payment of certain tolls, to the railway companies.

It is stated in Wood on Railroads (3d Ed.), pp 276–7, that we owe to Messrs. Trevithick and Vivian, the introduction of the first locomotive engine, acting solely by the expansive force of steam. Their patent was granted in 1802; but in 1804, their engine had attained a speed of only five miles an hour, with a total train load of only ten tons. In 1814, a locomotive constructed by George Stevenson, attained a speed of only four miles an hour, with a total train load of only thirty tons.

Wood on Railroads, pp. 288, 289.

In 1829, the Liverpool and Manchester Railway Company offered a premium of 500 pounds sterling "for the most improved locomotive engine," and one of the conditions, on which the premium was offered, was the following:

"The engine, if it weighs *six tons*, must be capable of drawing after it, day by day, on a well constructed railway, *on a level plane*, a train of carriages of the gross weight of *twenty tons*, including the tender and water-tank, *at the rate of ten miles per hour*, with a pressure of steam on the boiler, not exceeding fifty pounds per square inch."

Wood on Railroads, p. 305.

The premium was awarded to Robert Stevenson's engine, the "Rocket." The total weight of the engine, tender,

and train, was only seventeen tons; the trial was had on a level track; and the average speed per hour was only fifteen miles.

Wood on Railroads, pp. 309, 315.

We are now enabled to see why the dread, which we now have of railroad collisions, was not felt by the public when steam railways were *first* suggested, and we can understand why the *early* charters, even of steam railways, gave to the public the right to use them upon payment of tolls.

But while the "Rocket," in the trial above referred to, attained an *average* speed of only fifteen miles per hour, it did attain, for a short distance, a speed of twenty-nine and one-half miles an hour.

And on the formal opening of the Liverpool and Manchester Railway, on September 15th, 1830, the train attained a speed of thirty-five or forty miles an hour.

Adams' "*Railroads and their Origin*," *pp.* 2–34.

On a trial trip made on the Baltimore and Ohio Railroad, on August 28th, 1830, a speed of twenty-six miles an hour was made.

Adams, pp. 43, 45.

And on August 9th, 1831, a speed of thirty miles an hour was reached on a trial made on the Mohawk Valley Railroad.

Adams, pp. 47–50.

Even in England, where the railways were constructed with double tracks, it soon became apparent that it would

be utterly impracticable to permit the general public to use them, as canals and turnpikes had been used. And in America, where it was proposed to construct railways with single tracks, it was soon seen that it would be but little short of a statutory license to murder, if the railways were thrown open to indiscriminate use by the public.

SEC. 16. Such being the prior history of railroads, the Georgia Railroad Company was incorporated December 27th, 1831.

The twelfth section of the charter provides that said company "shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise, and produce, over the railroad or railroads to be by them constructed, while they see fit to exercise the exclusive right; *Provided*, that the charge of transportation or conveyance shall not exceed" certain specified rates; *Provided, always*, that the said company may, when they see fit, rent or farm out all, or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. *And the said company, in the exercise of their right of carriage or transportation of persons or property*, or the persons so taking from the company the right of transportation or conveyance, *shall so far as they act on the same, be regarded as common carriers.*

The fourteenth section provides that whenever the company "shall see fit to farm out, as aforesaid, to any person or persons, or body corporate, any part of their exclusive right of conveyance and transportation, *or shall deem it expedient to open the said road, or any part there-*

of, to public use, they *shall*, and may *adopt and enforce all necessary rules and regulations*, and have power to prescribe the construction, and size, or burthen, of all carriages and vehicles, and the materials of which such shall be made, that shall be permitted to be used, or pass on the said railroad, and the locomotive power that shall be used with them."

The thirteenth section provides that "if any person or persons shall intrude upon the said railroad or railroads, or any part thereof, by any manner of use thereof, or of the rights or privileges connected therewith, *without permission, or contrary to the will, of the said company*, he or they shall forfeit to the company, all the vehicles and animals that may be so intrusively introduced and used thereon, and the same may be seized by the company or its agents, or recovered by suit at law, and moreover the person or persons so intruding, shall, and may be indicted, as for a misdemeanor," etc.

See appendix to brief of Hon. Jos. B. Cumming.

It will be seen that so far from the Legislature of Georgia intending that the Georgia Railroad should be open to the public as turnpikes and canals were, it was not to be opened to the public at all, *unless the company deemed it expedient*; and even then, it was the positive duty of the company, to adopt and enforce all necessary rules, and regulations, to prevent collisions, and other accidents. Unless the company should deem it expedient to open the road, or some part of it, to the public, the exclusive right, (and I may say the exclusive *duty*), of transportation, was devolved upon the company; and this duty could not be shifted upon any one else by the company, except by farming it out, as provided by the charter; and even then, the company was bound to adopt and enforce all nec-

essary rules and regulations to prevent collisions and accidents, the same as if the company had thrown the road open to the public.

If the company saw proper, as it did for many years, to exercise the right and discharge the duty of transportation over its railroad, it was to be regarded "as a common carrier," and not as the mere proprietor of the railroad. If the company saw proper, as it afterward did, to farm out its right and duty of transportation, the farmee was also to be regarded as "a common carrier," and not merely as the agent or lessee of the company.

And both the company, and its farmee, were, in the exercise of said right and duty of transportation, to be "*subject to the rates*," specified in the twelfth section; and of course were to be entitled to the benefit of those rates.

SEC. 17. Such being the manifest right and duty of the Georgia Railroad Company in regard to transportation over its railroad, what was the object, which the parties had in view, in fixing a certain *maximum* of rates, in regard to the *transportation* of persons and property? for, we will see, hereafter, that the company was also authorized to charge for services *as warehouseman*.

We must assume that both the Legislature, and the company, understood the law as it existed when the charter was granted, and we must also assume that the law, as it then existed, was correctly announced by this Court in 94 U. S., 134, 133; *Munn v. Illinois*.

As stated by this Court, the law was as follows:

First—A carrier could, *in the absence of all law*, "make

his rates at will, and compel the public to yield to his terms, or forego the use."

94 *U. S.*, *p.* 134.

Second—The *common law* required that the charge of the carrier should be *reasonable*, and, in case of disputes, it was for a jury, under the direction of the Court, to decide.

94 *U. S.*, *p.* 134.

Third—This rule of the *common law*, like all other common law rules, *was subject to be changed by statute;* and it had been customary, from time immemorial, for the Legislature to declare what should be a reasonable compensation, or, perhaps more properly speaking, *to fix a maximum*, beyond which any charge made would be unreasonable.

94 *U. S.*, *pp.* 133, 134.

Fourth—If, therefore, a railroad company, proposing to act as carrier, was unwilling that the reasonableness and legality of its rates should depend upon the fluctuating verdicts of different juries, or upon the caprice, ignorance, or partisanship of different Legislatures, "*it was within the power of the company to call upon the Legislature to fix permanently* (in the charter) *this limit* (*or maximum*); *and if it was refused*, to abstain *from building the road and establishing the contemplated business.*"

94 *U. S.*, *pp.* 161, 162; *Railroad Company v. Iowa.*

Fifth—If the Legislature, in order to secure the construction of the railroad, should agree to fix a maximum in the charter, "*such maximum would be binding on the*

Courts in their adjudications, as well as on the parties in their dealings."

116 *U. S., p.* 330; *Stone v. Trust Co.*

Sixth—And under the celebrated Dartmouth College case, then but recently decided, it had been held that a charter was a contract binding upon subsequent Legislatures, as well as upon the Courts.

4 *Wheaton*, 518.
94 *U. S., p.* 161; *Railroad Company v. Iowa.*

Assuming, as we must, that the Legislature and the company understood the law, and the Constitution, as above declared by this Court, I say that there is no reasonable doubt, but that their object in specifying in the charter certain *maximum* rates, in regard to the *transportation* charges, was to permanently fix those rates as reasonable, so that they could not afterwards be reduced, either by the Legislature, or the Courts, without the consent of the company.

The notable difference between the manner in which the charter treats the *transportation* rates of the company, and the manner in which it treats the rates of the company as *warehouseman*, is worthy of attention in this connection.

As stated above, the first clause of the twelfth section directs that the company shall have the exclusive right of transportation, provided the charge of *transportation* did not exceed certain *maximum rates;* but the last clause of that section provides that "the said company shall have power to take, at the *storehouses* they may establish on, or annexed to, their railroad, all goods, wares, mer-

chandise, and produce, intended for transportation or conveyance; prescribe the rules of priority; and charge such *just and reasonable terms and compensation* as they may, by rules, establish, (which they shall cause to be published,) or as may be fixed by agreement with the owners; *which compensation shall, and may be distinct from the aforesaid rates of transportation.*" It will be seen that as the *transportation* business was to be the main business of the company, the company insisted that the Legislature should permanently fix *maximum* rates *which should be binding on future Legislatures, and upon the Courts.*

But as the *warehouse* business was to be a mere incident, and of little importance, the company was willing to leave the *warehouse rates* subject to the decision of the Courts and juries, and subject, as held by this Court, to the regulative power of future Legislatures.

108 *U. S.*, 531; *Ruggles v. Illinois.*
116 *U. S.*, 325; *Stone v. Trust Co.*

SEC. 18. The charter of the Georgia Railroad Company, passed in 1831, was evidently modeled upon the charter of the South Carolina Canal and Railroad Company, granted by the Legislature of South Carolina on December 19th, 1827.

See Statutes of South Carolina, Vol. VIII., pp. 354, 355.

The provisions of the original charter of the last named company, on the subject of tolls and charges, were as follows: "The said company shall, at all times, have the exclusive right of transportation on all the several railroads to be by them constructed; *Provided*, the charge for the transportation of goods, produce, etc., shall not exceed thirty-five cents per hundred pounds, on heavy articles,

and ten cents per cubic foot, on articles by measurement, for every one hundred miles, and five cents per mile on every passenger, and at the above rates for any greater or less distance; *Provided, also,* the said company may rent or farm out all or any part of their exclusive right of transportation above secured, to any individual or other company, subject to the restrictions of the above proviso.

The said company may, when they deem it most expedient, open all or any of their said canals or railways to public use, and may establish suitable rates of toll on the same; but shall not derive therefrom an annual income, clear of expense, exceeding twenty-five per cent. on the cost thereof."

The charter was amended and amplified on January 30th, 1828, and the above quoted provisions were substantially repeated, with additional powers to aid in carrying them out.

See Statutes of South Carolina, Vol. VIII., pp. 355, 363.

The charter was again amended December 19th, 1838, as follows:

"Be it enacted by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the South Carolina Canal and Railroad Company be, and they are hereby, authorized to charge for the transportation of passengers, at a rate not exceeding seven and one-half ($7\frac{1}{2}$) cents per mile, and for the transportation of goods by weight, not exceeding fifty cents per hundred pounds, per hundred miles; *Provided,* that it shall be in the power of the Legislature at any time hereafter, to repeal *the above provision;* and that the company shall not, while availing themselves of

the increased rates hereby provided for, divide among the stockholders more than seven per cent. per annum on the cost of the said road."

See Statutes of South Carolina, Vol. VIII., p. 484.

The fact that the Legislature of South Carolina expressly reserved the power to repeal *said amendment*, so as to restore the rates to the maximum fixed by the original charter, *is conclusive evidence that the Legislature did not believe that the original maximum could be reduced without the consent of the company.*

If the Legislature of South Carolina understood that the maximum rates specified in the original charter, of the South Carolina Canal and Railroad Company, could not be reduced without the consent of that company, it is fair to assume that the Legislature of Georgia, in adopting that charter as a model, understood that the maximum rates of the Georgia Railroad Company, could not to be reduced without the consent of that company.

SEC. 19. In the opinion of the Supreme Court of Georgia in this case, the Court say: "It (the company) was incorporated to construct a rail or turnpike road, and after providing for its organization, conferring upon it the right to cross the public roads, and bridge the rivers and water-courses, and giving it the right of way, etc., the act then proceeds to declare the special rights to be enjoyed.

"These were that the company should at all times have the exclusive right of transportation or conveyance of persons, merchandise, and produce, over the railroad and railroads to be by them constructed while they see fit to exercise the exclusive right.

"The *exclusive right* here granted *was to be enjoyed only upon one condition*, and that was, that the company should not charge more than fifty cents per hundred pounds on heavy freight, and five cents a mile for every passenger transported over the road.

"The Legislature was dealing with the subject-matter of a public highway, and public highways had, theretofore, been open to the free use of all persons for travel, for the transportation of goods, and the conveyance of passengers, without the payment of tolls or charges. To deny the use of a public highway to the people at large, and give it to an incorporated company, for its exclusive use, to convey passengers and freight, was deemed an extraordinary privilege; and *this extraordinary privilege* the Legislature agreed to grant to the company, provided it would not charge more than the above rates. Or, to put it in the form of a contract, it was agreed by the State that this company might build the road, and so long as it carried freight and passengers as prescribed by its charter, *it should not in anywise be used by the public*, but by the company *exclusively*.

"Under no reasonable construction of this charter, can it be claimed that the State contracted with the company to guarantee to it the exclusive right to charge the full amount of *the maximum rates*, or, indeed, any rates, so long as it does not exceed them. It can only be construed to mean that so long as *the specified maximum* of rates were not exceeded, the company, or its lessee, should have the *exclusive* right to carry freight and passengers over the road." (70 *Ga.*, 701, 702.) * * * * "The natural and proper construction of the words used is, that the State stipulates upon certain terms not to interfere with the company's *exclusive* right of transportation. *This was*

all. It nowhere stipulated not to interfere with its rates." (70 *Ga.*, 703.) * * * * *

Again the Court say: "It is claimed by the company that the *proviso* makes the contract between it and the State. But before this can be construed into a contract, such as is contended for, it would be necessary to insert words therein which are not used; and to make that a covenant, in which no words of covenant appear, the construction contended for is, we think, unauthorized *and violative of the rules as to what constitutes the usual office of a proviso.*"

70 *Ga.*, 703; *Georgia Railroad and Banking Company v. Smith.*

The opinion of Judge Simmons, whose decree in the Superior Court, was affirmed by the Supreme Court of Georgia, states the position of the Court in this language: "A greater charge than those mentioned in the proviso, *would not affect the company as to its general rights* under its charter; the *only* effect would be to lose or forfeit its *exclusive* right of transportation. *It could still use the road and charge what rates it pleased, subject to the regulation of the Legislature or the Courts.*"

See 6 *Semi-An. Rep., Ga. R. R. Com'n, p.* 52.

I have quoted fully from the opinion of the Court below, so as to be sure to state the position of the Court fairly.

The first error into which the Honorable Court was led, occurs in the following sentence: "The Legislature was dealing with the subject-matter of a *public highway*, and public highways had theretofore been open to the *free* use of all persons for travel, for the transportation of goods,

and the conveyance of passengers, *without the payment of tolls or charges.* To deny the use of a *public highway* to the people at large, and give it to an incorporated company, for its exclusive use, to convey passengers and freights, was deemed an *extraordinary* privilege," etc.

The county roads, built and maintained by the public, and the navigable rivers of the State of Georgia, were *public highways*, open to the *free* use of all, *without the payment of tolls or charges;* and if the Georgia Railroad Company had been stipulating with the State for the exclusive use and monopoly of one of the county roads, or of one of the navigable rivers of the State, such exclusive use or monopoly might well have been characterized as an "*extraordinary* privilege." But the company was not stipulating for the exclusive use of anything that had ever belonged to the public. The thing, for the use of which the company was stipulating, was not then in existence, and it was not expected to come into existence, unless the necessary capital and labor should be furnished by the company.

The State of Georgia was not expected to contribute a cent toward building the road; none of the counties or towns were to be taxed to aid in its construction; all of the funds necessary to procure the right of way, build the road, and keep it in repair after it was built, were to be furnished by the company; and if it proved to be unprofitable, the entire loss was to fall upon the company. The public had nothing to lose, and everything to gain, by the experiment; for if the road proved a success, the public were secured in the right to have their persons and property transported over it, at the same rates charged by the company to its own stockholders, who were to furnish the money to build it.

For the Legislature to say to a company, that if it will build a railroad, the company shall have the exclusive right of transportation over it, subject to certain maximum rates, is not to grant an "*extraordinary* privilege" at all. It is but the recognition of the *ordinary* right which every one has, to the exclusive use of whatever he invents or creates. Such a person takes nothing whatever from the public; but, on the contrary, he frequently confers inestimable benefits upon mankind.

The Supreme Court of Georgia are mistaken in supposing that any railroad ever was regarded as a "*public highway*," "open to the *free* use of all persons," "*without the payment of tolls or charges.*"

No charter can be found, either in England or America, where a railroad was to be used by the public "without the payment of tolls or charges." Some of the States have built railroads, with State funds, and as State enterprises, but they have never been thrown open to the "*free* use of all persons;" and tolls, or charges, have always been imposed for their use.

An examination of the statutes of Georgia passed prior to 1831, will show that ferries, bridges, turnpikes, and canals, had been frequently authorized by the Legislature of that State, and that the persons or corporations authorized to build and maintain them, were in all instances authorized to charge certain tolls for their use; and I will undertake to say, that with the exception of county roads streets, alleys, and navigable rivers, there is not now, and never has been, in the State of Georgia, "a public highway," "open to the free use of all persons," "without the payment of tolls or charges."

Even in the case of ferries, bridges, turnpikes, and canals, I can see nothing unjust to the public, or unreasonable, in the State giving the exclusive right of transportation to those who build and maintain them, provided they are compelled to serve all persons impartially and at reasonable maximum rates. The grant of the exclusive right of transportation to a ferry, bridge, turnpike, or canal company, would be "extraordinary," only in the sense of its being "unusual;" and it is "unusual," simply because it has been found that there is no serious danger of collisions or other accidents resulting from the use of such highways by the public. But the case of a single track railroad is wholly different. The exclusive right and duty of transportation on a single track railroad must *necessarily* be conferred and imposed upon some one person or corporation; it is impossible to throw such a road "open to the free use of all," either with, or without, the payment of tolls; and if the exclusive right and duty is to be given to, or imposed upon, any one, who could be preferred, in fairness, and justice, to the persons who have furnished the capital to build it?

The Legislature, in conceding to the Georgia Railroad Company the exclusive right of transportation over its own road, was therefore not giving to the company any "extraordinary privilege," nor was it "denying the use of a public highway to the public at large." The company got nothing but what it was fairly entitled to; and the public were not deprived of anything which had ever belonged to the public, or which could have been used by the public, even if it had been public property.

SEC. 20. The Supreme Court of Georgia having fallen into the error that the Legislature was attempting to deprive the people of the use of a public highway, which

had theretofore "been open to the free use of all persons," "without the payment of tolls, or charges," and to confer upon the Georgia Railroad Company the exclusive right to charge tolls for transportation over such highway, the Court very naturally deemed such a concession an "extraordinary privilege," which ought to be carefully guarded by the Legislature; and the only guard or protection which the Court could find in the charter, was the provision that the charges made by the company should not exceed certain maximum rates.

With this distorted vision, the Court could perceive in the charter nothing but a contract, in which "it was agreed by the State that this company might build the road, *and so long as it carried freight and passengers as prescribed by its charter, it should not in anywise be used by the public, but by the company exclusively;*" "*so long as the specified maximum of rates were not exceeded, the company, or its lessees, should have the exclusive right* to carry freight and passengers over the road."

This contract, not to interfere with the company's *exclusive* right of transportation, was, according to the Court, all there was in the matter; as the charter "nowhere stipulated not to interfere with its (the company's) rates."

70 *Ga.*, 701, 702, 703.

Let us first concede, for the sake of argument, that the Court were correct as to the nature and scope of the supposed contract; and then let us suppose that the company, or its farmee, has heretofore violated the contract by charging more than the maximum rates; what is to be the consequence?

This question is not answered by the Supreme Court of Georgia; but it is answered by Judge Simmons, whose decree they affirmed. He says: "A greater charge than those mentioned in the proviso, would not affect the company as to its *general rights* under its charter; the only effect would be to forfeit its *exclusive right* of transportation. *It could still use the road*, and charge what rates it pleased, subject to the regulation of the Legislature, or the Courts."

6 *Semi-An. Rep., Ga. R. R. Com'n, p.* 52.

If, in the case supposed, the company has "forfeited its *exclusive* right of transportation," the road would now be "open to the free use of all persons, for the transportation of goods, and the conveyance of passengers, without the payment of tolls or charges." (70 *Ga.*, 701.) Every citizen of Georgia would have the right to provide himself with as many locomotives, and cars, as he could purchase or lease, place them upon the Georgia Railroad, and run them to and fro over the road, upon schedules made to suit himself, and without any regard to the rights of any one else. As the road has but a single track, it is impossible for trains to pass in safety, except at sidings, which are wholly insufficient for such an immense and unorganized traffic.

The four-track railway of the New York Central would be a public nuisance if the attempt should be made to open it "*to the free use of all.*"

In the case supposed, who would furnish the money to keep the Georgia Railroad in repair? According to Judge Simmons, the company might, under its "*general rights,*" still use the road, in common with the public at large, *if it saw proper to do so;* but I do not understand

the Judge to say that the company would *be bound* by the charter to hazard its locomotives and cars in such a reckless operation.

If, then, the company should see proper, as it doubtless would, to keep its own equipment out of harm's way, I repeat the question, Who would keep the road in repair? Who would see that the water-tanks were filled, and the coal-bins supplied? Who would light the bridge and switch signals at night, and watch the track in daylight, to look out for rotten cross-ties and broken rails?

Is it not a slur upon the intelligence of the Legislature of Georgia to suppose that it made a contract, coupled with a condition, the breach of which would result in such absurd consequences as those indicated above?

The fourteenth section of the charter, while it contemplates, as a mere possibility, that the company might deem it expedient, at some future time, to open the road to public use, yet it is spoken of as the voluntary act of the company, and *not* as the result of any *forfeiture* of the company's *exclusive* right of transportation; and if the company should, at any time, deem it expedient to open the road to the public, said section expressly provides that the company "*shall*" adopt and "*enforce* all necessary rules and regulations," "prescribe the construction, size, or burthen, of all carriages, and vehicles, and the materials of which such shall be made, that shall be permitted to be used, or pass on the railroad, and the locomotive power that shall be used with them."

When we see the very great care manifested by the Legislature to provide for the safe operation of the road, in the remote possibility of the company *voluntarily*

throwing the road open to the public; when we see that no provision whatever is made for the operation of the road, in the event the company should *involuntarily* forfeit its *exclusive* right of transportation; and when we see that no such forfeiture is mentioned, or even hinted at, in the charter, may we not safely say, that no such forfeiture was ever contemplated, and therefore that the specification of maximum rates in the charter was not made as a *condition* upon which to work a forfeiture of the *exclusive* right of transportation, but was intended to fix a limit, within which all rates should be regarded as reasonable, provided they were impartially offered to all?

SEC. 21. It will be noticed that the Supreme Court of Georgia are forced to endow the Georgia Railroad Company, with *two* rights of transportation, in order to leave the company with one of those rights, after the other should have been forfeited.

The *theory* is that the company has a *general* right *to act as a common carrier;* and also a *special* right, viz., the *exclusive* right of transportation over its own road.

Under its *general* right as a common carrier, its rates are said to be subject to regulation by the Legislature, because the charter makes *no* stipulation in regard to the rates which it may charge *as a mere common carrier.*

Under its *special*, or *exclusive*, right of transportation, its rates are said to be subject to regulation by the Legislature, *notwithstanding the charter does make a stipulation in regard to them.*

It would seem to follow, therefore, that a charter stipulation in regard to rates, has no efficacy whatever.

The fault in the reasoning of the Court is, that it is based upon one of those fictions, which ingenious minds are forced to create, in order to sustain some preconceived theory. Now, the Georgia Railroad Company is a corporation, and to use the Court's own language, "if you assert that a corporation had certain privileges, *show us the words conferring them.*"

70 *Ga.*, 700.

Now, I challenge our opponents to show one word in the charter of that company, which confers upon it a *general* right *to act as a common carrier*, independent of, and distinct from, its *exclusive* right of transportation.

Unless it can be affirmed that the mere fact that a corporation is chartered as a *railroad company*, *ipso facto* gives it *the general right to act as a common carrier*, I am sure there is nothing in the charter which, even by *liberal implication*, would give the Georgia Railroad Company any such *general* right.

This Court, in 94 *U. S.*, 180, said that "the Winona and St. Peter Railroad Company was incorporated *as a common carrier*, with all the rights, and subject to all the obligations, that name implies;" but that is very far from saying that the mere name of a railroad company, implies a right on the part of that company, to act as a common carrier.

It is true that usually, and almost universally, railroad companies are incorporated to act as common carriers; but it is entirely possible to incorporate a railroad company with power to build and maintain a railroad, and to charge tolls for the use thereof, by others, without giving the

company any power to act as a common carrier, even upon its own road.

93 *U. S.*, 451; *L., S. & M. R. R. v. U. S.*

Most of the canal companies, and all of the turnpike companies, build and maintain their works, and charge toll for their use by others, without acting as common carriers themselves at all.

And when the Georgia Railroad Company farmed out *all* of its *exclusive* right of transportation to Mr. Wadley, *it ceased to have any right to act as a common carrier*, though it remained bound to the public to "adopt, and enforce," against the farmee, "all necessary rules and regulations," to secure the proper discharge of all charter obligations.

So far from the Georgia Railroad Company having a *general* right to act as a common carrier, distinct from its *special* or exclusive right of transportation, the only place in the charter where the company is authorized to act as a common carrier, occurs in the following clause in the twelfth section: "*Provided, always*, that the said company may, when they see fit, rent or farm out all, or any part, of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned: and the said company, *in their exercise of their right of carriage or transportation of persons*, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, *be regarded as common carriers.*"

We see, therefore, that the company, *in acting as a common carrier*, so far from acting under some independent *general* right (which is not even referred to in the charter), acts, as does the company's farmee, under the *exclusive right*, which is the *only* right given to the company by the charter to act as a common carrier.

If I am right in this position, then, if the company should forfeit its *exclusive* right of transportation, instead of having the right, as suggested by the Court below, to continue "to use the road, and charge what rates it pleased, subject to the regulation of the Legislature or the Courts," it would cease to have the right to act as a common carrier at all.

Upon the happening of the supposed forfeiture, the company's road would be thrown open to use by the public, and the company, having been deprived of all power to earn money as a common carrier, would have no means with which to keep the road in repair, even if it was its duty to do so, under the circumstances, which is far from being clear. It was to avoid this absurd result, of a single-track railroad being thrown open to the public, with no provision for its maintenance or control, that the Court below found it necessary to create a fictitious *general* right to act as a common carrier, distinct from the right of exclusive transportation.

Having shown that no such *general* right exists, and that the only right, is the exclusive right of transportation, it is impossible to believe that the maximum rates were used as a mere condition, to work a forfeiture of the *exclusive* right, when such a forfeiture would, as shown, be as disastrous to the public as to the company.

The maximum rates must, therefore, have been placed in the charter as a limit within which all rates charged by the company, in the exercise of its exclusive right of transportation, should be regarded as reasonable, if free from discrimination.

SEC. 22. According to the theory of the Court below, while "a greater charge than those mentioned in the proviso *would not affect the company* as to its *general* rights under its charter," yet "it would cause the company to forfeit its *exclusive* right of transportation;" but the company "could still use the road, and charge what rates it pleased, subject to the regulation of the Legislature or the Courts."

If the theory be sound, that the rates which the company may charge under its *general* rights as a common carrier, are not controlled by the maximum rates specified in the charter, and are subject alone to the regulation of the Legislature and the Courts, it follows that the company, in the absence of legislation upon the subject, could have charged, under its *general* rights as a common carrier, any rates which a jury may have found to be reasonable in fact, however much they may have exceeded the maximum rates named in the charter. According to the theory, this would have been perfectly legal and proper for the company to do, provided it saw proper to act under what is called its *general* rights as a common carrier. But according to the same theory, though such action would be *lawful* under its *general* right, it would be *unlawful* under its *exclusive* right, and would, in fact, cause an absolute forfeiture of the latter right.

We thus have, then, the anomalous case of a company having *two* rights, both firmly secured by charter contract,

where the exercise of one of those rights, in a perfectly lawful manner, works the utter forfeiture and destruction of the other right.

Such a theory may be very ingenious, but its ingenuity is all there is of it.

SEC. 23. If the Court below was right in supposing that the *only* effect of the company's charging more than the maximum rates "would be to lose or forfeit its *exclusive right* of transportation," *then the maximum rates would be of no value whatever, in determining a controversy between a shipper and the company as to the reasonableness of rates.*

The company could charge the shipper double the maximum rates specified in the charter, and yet if a jury should find that such a charge was reasonable in fact, the *shipper* could get no relief. The *State* could proceed to *forfeit* the company's *exclusive right* of transportation, for charging more than the maximum rates; but this would not benefit the overcharged *shipper*.

According to the theory of the Court below, the fixing of maximum rates in the charter was for the *sole* purpose of giving the *State* the power to *forfeit* the company's *exclusive right* of transportation, and was not intended for the protection of *shippers* at all.

This theory is as novel as it is ingenious. Charters similar to that of the Georgia Railroad Company have been in force in Georgia, South Carolina, Tennessee, and perhaps other Southern States, for the last half a century; and yet no instance has been found where any *State* has ever attempted to *forfeit* the *exclusive right* of transportation, because the maximum rates had been exceeded by a company.

On the other hand, the shipping public, and the railroad companies of that section, have, during all that time, acted upon the belief, that the maximum rates were fixed in the charter, for the express purpose of furnishing a standard by which the disputes between shippers and the companies were to be settled.

The case of *Arnold & Dubose v. Georgia Railroad, etc., Company*, 50 Ga., 304, decided by the Supreme Court of Georgia in 1873, was an action brought by *shippers* against the present Plaintiff in Error "to recover the excess of a payment for freight *beyond what is allowed to be charged by the charter of the company.*"

The Court held that the company, under the twelfth section of its charter, "can only charge for freight fifty cents per one hundred pounds, on heavy articles, for one hundred miles, and in proportion to that rate for a less distance than one hundred miles."

It was not pretended in that case that "the *only* effect" of charging more than the maximum rates, would be to lose or *forfeit* the *exclusive* right of transportation; the Court then regarded the maximum rates, as we do now, viz., as a limit beyond which the company could not go in its charges against a shipper, but within which, its charges were to be deemed lawful and reasonable.

The cases of *Knox & Gill v. S. C. R. R. Co.*, 5 S. C. Rep., p. 22, decided in 1873; *Bonham v. C., C. & A. R. R. Co.*, 13 Shand. (S. C.), 267, decided in 1880; and *Ragan & Buffet v. Aiken*, 9 Lea (Tenn.), 609, 610, decided in 1882, were all controversies between shippers and railroad companies; and it seems to have been conceded by all parties, that the maximum rates were intended as a limit between

the companies and the shippers, and that the shippers were entitled to the protection which the limit afforded. In none of those cases do I find the idea suggested, that the "*only* effect of charging more than the maximum rates, would be to *forfeit* the *exclusive* right of transportation."

SEC. 24. The Court below seem to lay some stress upon the fact that the maximum rates are contained in a clause of the twelfth section, which clause begins with the word "*proviso*."

It is said that it would be "violative of the rules as to what constitutes the usual office of a *proviso*, to allow it to operate as a contract, securing to the company certain specified rates."

Judge Simmons quotes the technical definition of a *proviso* as follows:

"A *proviso* in deeds or laws is a limitation or exception to a grant made, or power conferred, the effect of which is to declare that the one shall not operate, nor the other be executed, unless in the case provided."

He insists that there was no express grant to charge any rates whatever; and instead of the *proviso* containing a grant of the right to charge the rates mentioned in it, it was only intended as a limitation upon the exclusive right of transportation.

See 6 *Semi-An. Rep., Ga. R. R. Com'n, p.* 52.

The antique learning upon the subject of exceptions, limitations, conditions, reservations, covenants, and provisos, has been practically obsolete for half a century.

The modern idea of construction is to endeavor to ascertain the true intention, without regard to whether it is expressed in one form or another.

In the language of Mr. Sedgwick: "Ours is eminently a practical science. Arbitrary formulæ, metaphysical subtleties, and fanciful hypotheses aid us but little in our work. What is required in this department of our science is not formal rules, or nice terminology, or ingenious classification, but that thorough intellectual training, that complete education of the mind, which lead it to a correct result wholly independent of rules, and indeed almost unconscious of the process by which the end is attained."

Sedw. Stat. and Con. Law, 1st Ed., pp. 227, 228.

Speaking of the technical difference between conditions precedent and subsequent, Chancellor Kent says: "The distinctions on this subject are extremely subtle and artificial, and the construction of a deed as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case."

See Carnes v. Apperson, 2 *Sneed,* 564.

"Because the term 'provided' is used in a law, it does not necessarily follow that the matter which may succeed it is a proviso in its technical sense; it is the matter of the succeeding words, and not the form, which determines whether it is, or not, a technical proviso."

58 *Ala.,* 396; *Carroll v. State.*

Judge Simmons himself admits "that a proviso *may* contain a grant," and Bouvier says, "that whenever a pro-

viso contains *the mutual words of the parties* to a deed, it amounts to a *covenant.*"

See Bouvier Law Dictionary, Title, Proviso.

A proviso "operates as a condition, limitation, qualification, or *covenant*, according to its tenor."

2 *Rapalje & Lawrence Law Dictionary, p.* 1032.

"It is true that the word 'proviso' is an appropriate one to constitute a common law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, *it gives way to the intent of the parties as gathered from an examination of the whole instrument*, and has frequently been thus explained and applied as expressing simply a *covenant* or limitation in trust."

5 *Wall.*, 166; *Stanley v. Colt.*

We must remember that the charter of a corporation is not exactly a grant from the State; on the contrary, it is a contract between the State and the company. A proviso in such a charter, instead of being construed as a condition inserted for the exclusive benefit of a grantor, ought, in the language of Mr. Bouvier, to be construed as containing the mutual words of the contracting parties, namely, the State and the company; and, therefore, as amounting to a covenant between them in regard to the matter contained in it. This precise principle of construction was applied in the analogous case of *Boyd v. P. & R. R. R. Co.*, 54 Pa. St., 310, 315. In that case the company was authorized to build a railroad, and "from time to time to ordain and establish rules and regulations for the due ordering of all traveling and transportation on the said road, and for its preservation, with power to alter,

repeal, enlarge, or amend the said rules and regulations, as they may deem expedient, and that they shall have full power and authority to prescribe the kinds and descriptions of cars, carriages, or wagons, to be used on the said road for the conveyance of passengers and the transportation of the mails, or of goods, wares, merchandise, and minerals, and adopt and enforce such rules and regulations in relation to the transit thereof, as they shall deem expedient; *Provided*, that the toll on any species of property shall not exceed an average of four cents per ton per mile, nor upon each passenger an average of two cents per mile."

In construing this proviso, the Court say (page 315): "The right to charge tolls at all is not *expressly* given, *but it is an inevitable inference from the words of the proviso* to the twentieth section." In other words, the proviso was construed as containing a grant of the right to take the tolls mentioned in it, and not as providing for a forfeiture of the right to control the road in the event those tolls were exceeded. That case was approved in *Cumberland Valley Railroad Company's Appeal*, 62 Pa. St., 229, and in *Camblos v. P. & R. R. R.*, 4 Brewster, 622.

The word "provided" is defined by the standard lexicographers as being equivalent to the expression "with the understanding."

> *See Webster's Unabridged Dictionary, edition of* 1884.
> *Roget's Thesaurus, pp.* 173–280, *edition of* 1879.
> *See, also, Imperial English Dictionary, edition of* 1883.

If now we put that expression in the place of the word "provided," the section of the charter would read as follows: "The said Georgia Railroad Company shall at all times have the exclusive right of transportation or con-

veyance of persons, merchandise, and produce, over the railroad and railroads to be by them constructed, while they shall see fit to exercise the exclusive right, *'with the understanding that'* the charge of transportation or conveyance shall not exceed fifty cents per one hundred pounds," etc. If that mode of expression had been used, no one would ever have supposed that the mention of the rates was made for the purpose of providing for a forfeiture of the exclusive right of transportation in the event they were exceeded; on the contrary, every one would have recognized that the rates were mentioned so that the public and the company could know what rates the company had the right to charge in the exercise of its right of transportation over its road.

The charter of the Charlotte, Columbia and Augusta Railroad Company contains the following clause: "The said company shall have the exclusive right of conveyance or transportation of persons, goods, merchandise, and produce over the said railroad to be by them constructed, *and shall have the power to charge* for such transportation, etc., any sum not exceeding the following rates, viz.: fifty cents per one hundred pounds, per one hundred miles, on heavy articles," etc.

See Bonham v. C., C. & A. R. R. Co., 3 *Am. and Eng. Railroad Cases, p.* 309.
13 *Shand.* (*S. C.*), 267.

The charter of the C., C. & A. R. R. Co., was modeled upon the charter of the South Carolina Canal and Railroad Company, and there is no reason to suppose that the Legislature of South Carolina intended to grant the C., C. & A. R. R. Co., a more definite right to charge for transportation than was granted to the other company, and yet the only difference between the form of expression used in

the charter of the C., C. & A. R. R. Co., and the form of expression used in the charter of the S. C. Canal and R. R. Co., is, that the charter of the former says that the company shall have the exclusive right of transportation, *and shall have the power to charge* not exceeding certain rates, while the charter of the latter company says that the company shall have the exclusive right of transportation, *provided it does not charge* exceeding the same rates.

In other words, the charter of the C., C. & A. R. R. Co. uses the expression, "and shall have power to charge not exceeding certain rates," as equivalent to the expression used in the other charter, "provided that the charges do not exceed certain rates." Is it not the veriest quibbling to attempt a distinction between those charters, upon the mere ground that a different form of expression was used to convey what we must see was substantially the same idea in all of them, to wit: that the companies should have the exclusive right of transportation over their own roads, with the understanding that they were not to charge exceeding certain rates?

The charter of the Georgia Railroad, as stated above, was also modeled upon the charter of the South Carolina Canal and Railroad Company; and the same remarks of course apply to it.

The relative order in which different ideas are arranged in a sentence, cuts but a slight figure in its construction. In all of the charters just referred to they first provide that the companies shall have the exclusive right of transportation over their roads, and then follows a specification of the rates they are to be allowed to charge; but the judicial construction would be precisely the same, if the order of arrangement had been exactly reversed. The

charter of the Lexington and Frankfort Railroad Company is an illustration of this proposition. The twentieth section of that charter *first* provides that the company shall have power to charge for transportation any sum not exceeding certain rates, and *then* provides that "it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company, or to transport persons, or merchandise, or property of any description whatsoever, along said roads, or any of them, without the license or permission of the Board of Directors of said company."

See Laws of Kentucky, 1847–8, *p.* 34, *sec.* 20.

It would never occur to any one upon reading the charter of that company, that the rates were mentioned solely for the purpose of providing for the forfeiture of the exclusive right of transportation; and yet that charter is substantially the same as the charter of the other companies referred to above, except that the order of arrangement of the two ideas happens to have been reversed.

SEC. 25. The case of *Ragan & Buffet v. Aiken*, 9 Lea, 609, may be relied upon by our opponents as a direct decision to the effect that the Legislature has the right to reduce rates below the maximum rates specified in a charter.

The precise question as stated by the Court in that case was, "as to the right of the defendant, who was operating a railroad under a charter similar to the charter of the Nashville and Chattanooga Railroad Company, to demand and take from the complainant, a shipper, as freight on heavy articles, from twenty to twenty-five cents per one hundred pounds for carriage over the road, which was only fifteen miles long."

See 9 *Lea*, 614.

The provision of the charter was "that the charge for transportation or conveyance shall not exceed thirty-five cents per one hundred pounds on heavy articles for every one hundred miles."

It was suggested that, as there was no provision at all for any charge for freight except upon exactly one hundred pounds for exactly one hundred miles, the defendant could make no charge for carrying any other amount any other distance. This suggestion of course was treated as frivolous.

It was then argued, however, and with ability, that the defendant was bound to charge according to the rates fixed in the charter in proportion to the exact distance carried, and as the road was only fifteen miles long, he could only charge fifteen one-hundredths of thirty-five cents for transporting one hundred pounds of heavy freight over the entire road, which was manifestly an inadequate compensation for the services rendered. The Court decided, contrary to the opinion of the Supreme Courts of Georgia and South Carolina upon similar charters, that the defendant was not required to proportion his charges to the distance actually carried, and that he might, within the maximum rates specified in the charter, make any charge that would be reasonable under the circumstances of each particular case. His Honor, Judge Cooper, after deciding the question actually before him, states that the object of such charters "was to fix a maximum charge beyond which the companies could not go, and to leave the tariff of charges within that limit to the companies, *subject to the rules of the common law, and the regulating power of the Courts and Legislature.*"

9 *Lea*, 620.

The matter italicized may be relied upon by our opponents; but we submit that, so far as this discussion is concerned, it must be treated as mere *obiter dictum*.

There had been no attempt on the part of the Legislature of Tennessee to regulate the rates of the railroad company whose charter was under consideration in that case. The question was exclusively between a shipper and the party operating the railroad. When the Court decided that "the object of such charters was to fix a maximum charge beyond which the companies could not go, and to leave the tariff of charges within that limit to the companies," the Court decided all that was necessary for the adjudication of the case before them. The defendant in that case had kept within the maximum, and his action was sustained by the Court. Whether the defendant was subject to any rules of the common law; and if so, to what rules; and whether he was subject to "the regulating power of the Courts and the Legislature," and if so, in what manner and to what extent, it was unnecessary for the Court to determine.

The Supreme Court of South Carolina, in the case of *Bonham v. C., C. & A. R. R. Co.*, 9 Am. and Eng. Railroad Cases, pp. 311, 312; 13 Shand. (S. C.), 267; in construing a similar charter, say that "the whole purpose of the charter was to fix an upward limit to railroad charges, and not to fix a scale by which they might be computed with reference to a unit common to all classes of goods. This (says the Court) would leave the company free to pursue that course which would be dictated by business necessity or prudence within the limits fixed by law."

This expression of the Supreme Court of South Carolina is the exact equivalent of so much of the expression

of the Supreme Court of Tennessee as says, that "the object was to fix a maximum charge beyond which the companies could not go, and to leave the tariff of charges within that limit to the companies."

The two decisions would have agreed if the opinion of Judge Cooper had stopped at that point, which was as far as the case before him actually called upon him to go. Both of the Courts would then have agreed that the object of such charters was to fix a maximum charge, or upward limit, leaving the companies within that limit to pursue that course which would be dictated by business necessity or prudence.

In going outside of and beyond the case before him, to say that the tariff of charges within the maximum, would be subject to the rules of the common law, and the regulating power of the Courts and the Legislature, the opinion of Judge Cooper would not be authority, even in the inferior Courts of Tennessee.

I submit, however, that if the expression had been called for by the case before him, his language does not go to the extent claimed by our opponents. He does not undertake to say to what rules of the common law the company would be subject; nor does he indicate the character of the regulating power which he says that the Courts and the Legislature possess. I do not claim that railroad companies are exempt from all control simply because their charges are kept within their maximum; on the contrary, I admit, that in many respects such companies are subject to the rules of the common law, and to the regulating power of both the Courts and the Legislature. They must provide suitable and safe appliances for the transportation of freight; they must forward it in the order in

which it is received, and with due dispatch; they must notify the consignee promptly of its receipt, and must store it in suitable warehouses until it can be taken away; and they must not discriminate between different shippers, shipping similar goods, under similar circumstances. As to all of such matters, notwithstanding their charges are far below their maximum, such companies would be subject to the rules of the common law, and to the regulating power of the Courts and the Legislature. The Legislature would clearly have the power to pass such laws as might be found necessary to compel such companies to transact their business expeditiously, safely, and impartially, and to prevent favoritism or discrimination; and if that is the extent to which Judge Cooper intended to go in the expression used by him, we have no fault to find with his language. But if his Honor intended to say, that a railroad company, in whose charter a maximum rate is fixed, can (while acting fairly and impartially between all shippers) be compelled either by the Courts, or the Legislature to reduce its rates below that maximum, then I think his Honor has misconceived the object of fixing a maximum rate in such charters. If a Court, under its common law power, could compel the company to charge less than the maximum rate, simply because the rate charged in the particular case seemed to the Court to be unreasonably high, then the Court would be substituting its own judgment as to what was reasonable, for the judgment of the State and the company, as expressed in the charter. If the Legislature was competent to agree with the company as to what were reasonable rates for certain services, and if such agreement was actually embodied in the charter, then surely the Court could not set aside the agreement contained in the charter, and make a new agreement for the company, without the company's consent; nor would the Legislature have any more power

than the Court to repudiate the charter contract, and by subsequent enactment, declare unreasonable, what the State, in the charter, had agreed should be regarded as reasonable.

If the Court could reduce the maximum rates fixed by the charter, there would be no use in fixing such rates in the charter; they would be of no service either to the public or to the company. For, if the Court under its common law power, could compel a company to charge less than its maximum rates, simply because those rates were deemed unreasonably high in that particular case, the Court could also allow the company to charge above the maximum, whenever the Court deemed the maximum unreasonably low; for the common law rule as much entitles the carrier to demand a reasonable rate, as it protects the shipper from the exaction of an unreasonable rate.

The very object of fixing a maximum rate as explained by this Court, in *Munn v. Illinois*, 94 U. S., 133, and *C., B. & Q. R. R. v. Iowa*, 94 U. S., 161, 162, *is to take the case of the particular company out of the operation of the common law, and place it upon a permanent contract basis.*

It was well known to the Legislature and to the railroad companies, that unless the rates were fixed in the charter they would be left to the regulation of the common law, and every charge made by the companies, would have to stand or fall by its reasonableness, as judged by the circumstances of the particular case. The question of reasonableness being one of mixed law and fact, would have to be left to a jury, under the charge of the Court, and different juries would arrive at different results, even when the facts in the different cases were substantially the

same. In this way different shippers would be charged different rates for the same services, as different juries might decide; and a system of practical discrimination between different shippers would be worked out through the form of judicial proceedings. It was, therefore, better for the shippers themselves, that a uniform standard should be adopted, which the Courts and the Legislature could require the company to apply impartially to every one.

It was also known, both to the Legislature and to the companies, that the cost and expense of building and maintaining railroads would be very great; capital would have to be invited from abroad, and it would be unwilling to invest in such enterprises without some assurance of a fair and fixed compensation for valuable services actually rendered.

It is believed that few, if any, railroads in the South, could have been built, if it had been understood that they were to depend for their compensation, upon such rates as juries, or Legislatures might, from time to time, see proper to allow.

The Granger cases were all decided by this Court upon the principle that, *in the absence of charter contracts to the contrary*, railroad companies, like other common carriers, were subject to the operation of the common law rule that the charges of a carrier must be reasonable, and, in the absence of statutory regulation, that the Courts were the proper tribunals to decide what was reasonable; but that it was competent for the Legislature to take that power away from the Courts, and declare by statute what rates should be regarded as reasonable. It follows that where there are charter contracts fixing maximum rates, and

thereby declaring that those rates shall be permanently regarded as reasonable, the Courts are at once deprived of their common law power to decide upon the reasonableness of the rates, and if the Courts have no such power, the Legislature cannot have it.

SEC. 26. Our opponents may insist that even if our construction of the charter is correct, still the Legislature of Georgia may repudiate the charter contract under what is known as the police power of the State. In other words, the State could say to its citizens, "If you will spend five millions of your money in building a railroad, and will conduct the transportation business of the public over your road with safety and dispatch, you may charge certain rates to reimburse you for your hazardous investment," and yet after the road is built and the public are getting the benefit of it, the State may, under its police power, reduce the rates to such a figure as the Legislature or a Commission may deem reasonable.

This is stretching the police power far beyond what any respectable Court has yet carried it.

In *C., B. & Q. R. R. v. Iowa*, 94 U. S., 161, while this Court held that railroad companies were "subject to legislative control as to their rates of fare and freight *unless protected by their charter*," the Chief Justice was careful to add that "it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract. Whatever is granted is secured, subject only to the limitations and reservations in the charter or in the laws or constitutions which govern it."

I concede that the police power of a State over railroads has been carried very far; it has been held that the State may, within reasonable bounds, regulate the speed of trains; may require the bell to be rung or the whistle to be sounded at certain intervals; may require the road to be fenced, and the company to pay for stock killed upon the track; may require the company to open stations at convenient points, and stop trains for passengers and freight; may require ticket offices to be opened a reasonable time before arrival of trains; may require that passengers be comfortably seated in comfortable cars; may require that tariffs of rates be posted conspicuously, and rigidly adhered to; and may punish discrimination between different shippers, even where the charges against all are below the maximum allowed by the charter.

It will be noticed, however, that all such regulations relate to the safety, comfort, health, and convenience of the public, or to the protection of property, or to the prompt, fair, and impartial discharge of the duties which a railroad company owes to the public under its charter obligations. Such regulations, though at times frivolous and even oppressive, and though they frequently increase the company's expenses, yet they in no instance take from the company any essential right secured by the charter. They are supervisory, and regulative of the duties which the companies owe under their charters, but they are not destructive of any of the important rights secured by the charters.

In the case of *Turnpike Co. v. Davidson County*, the Legislature passed an act to require a turnpike company to set back its gates two miles from where they had been located under the charter, it appearing that a populous city had grown up at, or near, the first gate. Chancellor

Cooper, in deciding the statute unconstitutional, used this language in regard to the police power: "Undoubtedly, a corporation, like an individual citizen, takes its rights and franchises subject to the regulating control of the Legislature." "The limit," says Mr. Cooley, "to the exercise of police powers in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society; they *must not be in conflict with any of the provisions of the charter;* and they must not, under pretence of regulation, take from the corporation any of the *essential rights and privileges which the charter confers.* In short, they must be police regulations in fact, and not amendments to the charter *in curtailment of the corporate franchise.*"

See 3 *Tenn. Chan. Rep.*, 405.

In the case of the *State v. Martin*, 1 Legal Reporter, p. 376, 377, it appeared that after a turnpike company had built their road under their charter, the Legislature passed an act exempting from toll certain persons who were not exempt under the charter. It was attempted to sustain the statute under the police power: but the Supreme Court of Tennessee, in deciding the statute unconstitutional, used this language: "The right to take the tolls prescribed in the charter must be taken as one of the terms of the contract, and the investment of the moneys of the corporators in building the road, in consideration of the benefits and privileges thus granted. This being so, the contract must stand intact, and the rights granted remain without diminution, not subject to impairment by any law, without consent of the corporators, unless some other rule of law can be brought to bear upon the question, under which, action by the Legislature can be sheltered and protected. It is insisted, that under what

is known as the police power, the section of the Code can be maintained. This power in the State is one settled and conceded by our Courts, and by standard authors on the subject of constitutional law, but at the same time, one that is exceedingly difficult to define with precision, so as to include all that is within its scope, and, exclude, rigidly, all that is beyond it."

The Court then quote approvingly the extract which we have taken from the opinion of Chancellor Cooper, and conclude as follows: "In other words, the true principle is, that the corporation may be subject, like an individual, to regulation, as to the manner of enjoyment of his rights, so as to subordinate his enjoyment of them to the interest of the general public; but this must be so done as to leave its corporate privilege intact, not lessened or impaired in value. Regulation in its enjoyment is the rule, the enjoyment of the right being always implied. Regulation, not deprivation, is the principle that underlies all the cases on this question."

See 1 *Leg. Rep., pp.* 376, 377–8.
See, also, 4 *Houston* (*Del.*), 536; *P., W. & B. R. R. v. Bowen.* 61 *Mo.*, 32; *Sloan v. P. R. R.*

SEC. 27. It may be insisted that the Legislature which granted the charter of the Georgia Railroad Company had no power to bargain away the right to regulate the rates of that company, so as to bind subsequent Legislatures.

It was said by Chief Justice Waite, in *Stone v. Farmers' Loan and Trust Company*, 116 U. S., 325, that "this power of regulation is a power of government, continuing in its nature, and *if it can be bargained away at all*, it can only be by words of positive grant, or something which is in law equivalent."

The italicised words of the Chief Justice have been supposed by some to imply a doubt upon his part, as to the power of a Legislature to surrender, *to any extent*, the right of regulation *in any case.*

But it is manifest that the expression ought to be confined to the case then before him; in which it was claimed that a railroad company had been vested by its charter with absolute power to fix and regulate its tolls and charges, *unrestrained by any specification of maximum rates in its charter.* It was claimed by the company in that case, "that the State granted to the company, for the full term of its corporate existence—that is to say, forever—the right of managing its own affairs, and regulating its charges for the transportation of persons and property, *free of all legislative control.*"

116 *U. S.*, 325.

In this case, however, no such claim is made by the Georgia Railroad Company.

It is not claimed by the company that it has the right to regulate its charges, "*free of all legislative control;* on the contrary, its only claim, is, the right to regulate its charges, *subject to legislative control*, as that control was manifested in fixing the maximum rates in its charter.

So far from denying the right and power of legislative control, the company's claim rests exclusively upon the proposition that the Legislature of 1831 did have the right of absolute control; and that it exercised that right of control, when it fixed the maximum rates in the company's charter. The company claims, that the Legislature having exercised its right of control in 1831, when it fixed the maximum rates, no subsequent Legislature can repu-

diate its action, as was attempted to be done in the passage of the Act of October 14th, 1879.

If the Legislature of 1831 had no power to control the matter, then the Legislature of 1879 had none.

If the Legislature of 1831 did have the power to control the matter, and exercised that power, in fixing the maximum rates in the company's charter, then the exercise of the power, having been valid when done, is binding upon all subsequent Legislatures.

It was said by this Court in the case last cited, that "it is now settled in this Court that a State has power to limit the amount of charges by railroad companies," * * * "*unless restrained by some contract in the charter.*"

If the Court had thought that one Legislature could not bind subsequent Legislatures, by charter contracts, fixing maximum rates, the Court would have said that "a State has power to limit the amount of charges by railroad companies, *whether a contract attempting to restrain the State, is contained in the charter, or not.*"

But so far from saying any such thing, the Court said, in *Chicago Railroad Company v. Iowa*, 94 U. S. 161, "it is now too late to contend that the charter of a corporation is not a contract, within the meaning of that clause in the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of a contract. *Whatever is granted, is secured*, subject only to the limitations, and reservations, in the charter, or in the laws, or constitutions, which govern it."

And in the same case (p. 162), the Court said, "it was within the power of the company to call upon the Legislature to fix permanently this limit (*i. e.*, maximum rates), and make it a part of the charter," * * * "and if that had been done, the charter might have presented *a contract against future legislative interference.*"

While "the power of regulation is a power of government, continuing in its nature," (116 *U. S.*, 325,) it does not belong to what has come to be known, technically, as the Police Power. On the contrary, I have, in the last preceding section of this argument, shown that a State cannot, under the pretense of exercising its Police Power, reduce the rates of a company, when they have been secured by charter contract.

The power of regulation is an *ordinary* power of government; it certainly is of no more consequence, or importance, than the power of taxation; and I need not prolong this argument, to cite the many cases, in which this Court has held, that one Legislature may bind subsequent Legislatures, by an agreement on the part of the State, to surrender forever, the "governmental power" of taxation, in relation to the property of a corporation.

ED. BAXTER,
Of Counsel for Plaintiff in Error.

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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 284.

THE GEORGIA RAILROAD & BANKING COMPANY,

PLAINTIFF IN ERROR,

VS.

James M. Smith, Campbell Wallace and Leander N. Trammell, Railroad Commissioners of Georgia, and Clifford Anderson, Attorney-General of Georgia.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

APPENDIX TO ARGUMENT.

ED. BAXTER,
Of Counsel for Plaintiff in Error.

APPENDIX.

I have collected in this appendix, specimen sections taken from various charters, in which the exclusive right of transportation was given the railroad companies.

It will be seen that the language employed in the twelfth section of the charter of the Georgia Railroad Company, is only one form of expressing an idea, which has been expressed in many forms in different railroad charters.

CHAPTER I.

The twelfth section of the charter of the Georgia Railroad Company, passed December 27th, 1831, is as follows:

"SEC. 12. The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise, and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right: *Provided*, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles, and five cents per mile for every passenger: *Provided, always*, That the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the per-

sons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers. And it shall be lawful for the said company to use or employ any section of their intended railroad, subject to the rates before mentioned, before the whole shall be completed, and in any part thereof, which may afford accommodation for the conveyance of persons, merchandise or produce. And the said company shall have power to take, at the store-houses they may establish on or annex to their railroad, all goods, wares, merchandise and produce intended for transportation or conveyance; prescribe the rules of priority; and charge such just and reasonable terms and compensation for storage and labor as they may by rules establish, (which they shall cause to be published,) or as may be fixed by agreement with the owner; which compensation shall and may be distinct from the aforesaid rates of transportation."

CHAPTER II.

In the charter of the Georgia Railroad Company, the exclusive right of transportation is first given, and then the right to charge for transportation is given; while in the charters collected in this chapter, the order is exactly reversed—the right to charge for transportation comes first in order, and the exclusive right of transportation is afterward given in the same section.

An Act to incorporate the Baltimore and Ohio Railroad Company. Passed by the General Assembly of Maryland, February 28th, 1827. See Laws of Maryland, December Session, 1826, Chapter CXXIII.:

"SEC. 18. *And be it enacted*, That the said president and directors, or a majority of them, shall have power to purchase, with the funds of said company, and place on, any railroad constructed by them under this act, all machines, wagons, vehicles, or carriages of any description whatsoever, which they may

deem necessary or proper for the purposes of transportation on said road, and they shall have power to charge for tolls upon (and the transportation of persons,) goods, produce, merchandise, or property of any kind whatsoever, transported by them along said railway from the city of Baltimore to the Ohio River, any sum not exceeding the following rates, viz.: On all goods, produce, merchandise, or property of any description whatsoever, transported by them from west to east, not exceeding one cent a ton per mile for toll, and three cents a ton per mile for transportation; on all goods, produce, merchandise, or property of any description whatsoever, transported by them from east to west, not exceeding three cents a ton per mile for tolls, and three cents a ton per mile for transportation, and for the transportation of passengers not exceeding three cents per mile for each passenger; *and it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company*, or to transport persons, merchandise, produce, or property of any description whatsoever, along said roads, or any of them, without the license or permission of the president and directors of said company; and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said roads, are hereby vested in the said company, incorporated by this act, and their successors, forever; and the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the States assenting to this law."

An act to incorporate the Baltimore and Susquehanna Railroad Company. Passed by the General Assembly of Maryland, February 13th, 1828. See Laws of Maryland, December Session, 1827, Chapter 72:

"SEC. 20. *And be it enacted*, That the said president and directors shall have power to purchase, with the funds of said company, and place on any railroad constructed by them under this act, all machines, wagons, vehicles or carriages of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and that they shall have power to charge for tolls, (and the transportation

of persons,) goods, produce, merchandise or property of any kind whatsoever, transported by them along said railway, from the city of Baltimore to the Susquehanna River, any sum not exceeding the following rates, viz.: On all goods, produce, merchandise or property of any description whatsoever, transported by them from the Susquehanna to Baltimore; that is to say, from north to south, not exceeding one cent a ton per mile for transportation; on all goods, merchandise or property of any description whatsoever, transported by them from Baltimore to, or toward, the Susquehanna; that is to say, from south to north, not exceeding three cents a ton per mile for tolls, and three cents a ton per mile for transportation; and for the transportation of passengers, not exceeding three cents per mile for each passenger; *and it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company*, or to transport persons, merchandise, produce or property of any description whatsoever, along said road, or any of them, without the license or permission of the president and directors of said company; and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in the said company, incorporated by this act, and their successors, forever; and the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the impositions of any tax or burthen, by the States assenting to this law."

An Act to authorize the president, managers and company of the Washington and Baltimore Turnpike Road, to construct a railroad from the city of Baltimore to the District of Columbia, in the direction of the city of Washington. Passed by the General Assembly of Maryland, March 3d, 1828. See Laws of Maryland, December Session, 1827, Chapter 170:

"Sec. 7. *And be it enacted*, That the said president and managers, or a majority of them, shall have power to purchase, with the funds of said company, and place on any railroad constructed by them under this act, all machines, wagons, vehicles, or carriages of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on

said road, and they shall have power to charge for tolls upon (and the transportation of persons,) goods, produce, merchandise, or property of any kind whatsoever, transported by them along said railroad, any sum not exceeding the following rates: For transportation of passengers, three cents per mile for each passenger, including all customary baggage; on all goods, produce, merchandise, or property of any description whatsoever, transported by them, not exceeding one cent a ton per mile for toll, and three cents a ton per mile for transportation; *and it shall not be lawful for any other company, or any other person or persons whatsoever, to travel upon, or use any of the roads of said company*, or to transport persons, merchandise, produce, or property of any description whatsoever, along said road, or any of them, without the license or permission of the president and managers of said company; and the said road, with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in said company, and their successors, forever; and the shares of the capital stock of said company shall be deemed and considered personal estate; but all property except the road and the carriages used thereon, which may be held by said company, shall be subject to taxation as the property of a like kind held by citizens of this State.

"SEC. 8. *And be it enacted*, That if at the end of two years after the said road shall be completed from the beginning to the end thereof, it shall appear from the average profits of the said two years that the said income and profits thereof will not bear a dividend of six per centum per annum on the whole capital stock of the said company expended in the construction thereof, then it shall and may be lawful to and for the said president and managers to increase the tolls hereinbefore allowed, so much upon each and every allowance thereof as will raise the dividends to six per centum per annum; *Provided, however*, That said tolls shall in no event be increased more than fifty per centum on their amount as fixed by this act; *And provided, nevertheless*, That it shall be the duty of said president and managers, whenever the dividends arising from the stock at the rates hereinbefore prescribed equal six per centum per annum, to reduce the said rates to the original rates hereinbefore prescribed."

An Act to incorporate the Elkton and Wilmington Railroad Company. Passed by the General Assembly of Maryland, March 14th, 1828. See Laws of Maryland, December Session, 1827, Chapter 187 :

"SEC. 19. *And be it enacted*, That the said president and directors shall have power to purchase, with the funds of said company, and place on any railroad constructed by them under this act, all machines, wagons, vehicles, or carriages of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and that they shall have power to charge for tolls (and the transportation of persons,) goods, produce, merchandise, or property of any kind whatsoever, transported by them along said railway, from Elkton to Wilmington, any sum not exceeding the following rates, viz.: On all goods, produce, merchandise, or property of any description whatsoever, transported by them—that is to say, not exceeding three cents a ton per mile for toll, for transportation ; and for the transportation of passengers, not exceeding three cents per mile for each passenger; and it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon, or use any of the roads of said company, or to transport persons, merchandise, produce, or property of any description whatsoever, along said road, or any of them, without the license or permission of the president and directors of said company, and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in said company incorporated by this act, and their successors forever; and the shares of the capital stock of the said company, shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the States assenting to this law, except upon that portion of the permanent and fixed works of said company, which may lie within the State of Maryland, and that any tax which shall hereafter be levied upon said section shall not exceed the rate of any general tax, which may at the same time be imposed upon similar real or personal property of this State, for State purposes."

"SEC. 24. *And be it enacted*, That nothing in this act contained, shall be construed so as to prevent the Legislature of this State from legislating upon the subject of the tolls reserved

in this act at any time after the expiration of twenty years from the passage of this act; *Provided*, That at no time shall the toll be so regulated or reduced as to yield less than six per cent. per annum."

An Act to authorize the New Castle and French Town Turnpike Company to make a railroad from French Town, on Elk River, to the Delaware line, in a direction toward New Castle. Passed by the General Assembly of Maryland, March 14th, 1828. See Laws of Maryland, December Session, 1827, Chapter 207:

"SEC. 6. *And be it enacted*, That the said directors may procure and use on any railroad which shall be constructed by them in virtue of this act, all machines, wagons, carriages and other vehicles, which they may deem proper or necessary, for the purposes of transportation on said road, and they shall have power to charge and receive tolls for using the said road, not exceeding three cents per ton per mile; for the transportation of passengers, not more than twenty-five cents each for the whole distance, including customary baggage, not exceeding one hundred pounds weight, twelve and an half cents; *and it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any part of the said railroad*, or to transport persons, or property of any description thereon, without the license or permission of the said directors."

"SEC. 10. *And be it enacted*, That the State hereby reserves the right to alter or abolish said charter at any time after the period of twenty years from the completion of said road, on providing that such compensation shall be made to the stockholders as the Legislature shall deem reasonable."

An Act to incorporate the Lexington and Ohio Railroad Company. Passed by the General Assembly of the State of Kentucky. Approved January 27th, 1830. See Acts of Kentucky, 1829, Chapter CCXCIII., page 126:

"SEC. 20. *Be it further enacted*, That the said president and directors shall have power to purchase, with the funds of said company, and place on any railroad constructed by them under this act, all machines, wagons, vehicles, or carriages of

any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and that they shall have power to charge for tolls (and the transportation of persons,) goods, produce, merchandise and property of any kind whatsoever, transported by them along said railway, between Lexington and the Ohio River, any sum not exceeding the following rates, to wit: On all goods, produce, merchandise, or property of any description whatsoever, transported by them on the railway between Lexington and the Ohio River, it shall be lawful for them to charge for every hundred pounds transported sixty miles and upwards, two and a half mills per hundred pounds weight for each mile; for every hundred pounds weight transported over twenty miles and under sixty miles, three mills for each mile the same may be transported; for every hundred pounds weight transported a distance not exceeding twenty miles, three and a half mills for each mile the same may be transported; and for the transportation of passengers, four cents per mile for each passenger. Silver and gold, bullion, money of all descriptions, and mails are excepted from the rates herein established, and for which the company, by their president and directors, or a majority of them, or their agents, shall be, and they are hereby authorized to contract especially, for their transportation, upon such terms as the parties interested may agree upon; *and it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company,* or to transport persons, or merchandise, or property of any description whatsoever, along said roads, or any of them, without the license or permission of the president and directors of said company; and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said roads, are hereby vested in said company incorporated by this act, and their successors forever; and the shares of the capital stock, and all the estate, real and personal, belonging or appertaining thereto, shall be exempt from the imposition of taxes by the Commonwealth of Kentucky, for the term and space of twenty years from the passage of this act, and shall never be taxed beyond the rate of tax imposed upon real estate in the Commonwealth, estimated upon the original cost for the execu-

tion and completion of the proposed works; nor will the Legislature of this Commonwealth, for the space of twenty years from the passage of this act authorize any other railroad to be laid down on a parallel line with the one located by this company, approaching nearer than twenty miles. But nothing contained in this act shall be so construed as to prohibit the laying down another railway, diverging from that laid down by the company herein incorporated; *Provided*, It does not approach at an angle more acute than fifteen degrees."

An Act to incorporate the Green River Railroad Company. Passed by the General Assembly of the State of Kentucky. Approved December 22d, 1831. See Acts of Kentucky, 1831, Chapter DCXXII., page 150:

"SEC. 19. *Be it further enacted*, That the said president and directors shall have power to purchase, with the funds of said company, and place on any railroad, constructed by them under this act, all machines, wagons, vehicles or carriages of any description whatever, which they may deem necessary or proper, for the purposes of transportation on said road; and that they shall have power to charge for tolls, and the transportation of persons, goods, produce, merchandise and property of any kind whatsoever, transported by them along said railway, any sum not exceeding the following rates, to wit: On all goods, produce, merchandise, or property of any description whatsoever, transported by them on said railway, it shall be lawful for them to charge, for every hundred pounds transported sixty miles or upward, two and a half mills per hundred pounds weight, for each mile; for every hundred pounds weight, transported over twenty miles and under sixty miles, three mills for each mile the same may be transported; for every hundred pounds weight transported a distance not exceeding twenty miles, three and a half mills for each mile the same may be transported; and for transportation of passengers, five cents per mile for each passenger; silver and gold bullion, money of all descriptions, and mails, are excepted from the rates herein mentioned and established, and for which the president and directors, or a majority of them, or their agents, shall be, and they are hereby authorized to contract especially for their transportation, upon

such terms as the parties interested may agree upon; *and it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company*, or to transport persons or merchandise, or property of any description whatsoever, along said roads, or any of them, without the license or permission of the president and directors of said company; and that the said road or roads, with all their works, improvements, or profits, and all machinery for transportation, used on said railroad or roads, are hereby vested in said company incorporated by this act, and their successors forever; and the shares of the capital stock, and all the estate, real and personal, belonging or appertaining thereto, shall be exempt from the imposition of taxes by the Commonwealth of Kentucky, for the term and space of twenty-five years from the passage of this act, and shall never be taxed beyond the rate of tax imposed upon the real estate in this Commonwealth, estimated upon the original costs for the execution and completion of the proposed works; nor will the Legislature of this Commonwealth, for the space of twenty-five years from the passage of this act, authorize any other railroad to be laid down, on a parallel line with the one located by this company, approaching nearer than twenty miles; but nothing contained in this act shall be so construed as to prohibit the laying down another railway, diverging from that laid down by the company herein incorporated, provided it does not approach at an angle more acute than fifteen degrees; *Provided*, That nothing in this act contained, shall be so construed as to prohibit the erection of a railway or macadamized way, from Russellville to Clarksville, or to any point on the Cumberland River."

An Act to incorporate the Cape Fear and Yadkin Railroad Company. Incorporated by the General Assembly of North Carolina. See Acts, North Carolina, 1831-2, page 39:

"XV. *And be it further enacted*, That so soon as ten miles of said road or canal shall be completed, and as often thereafter as any other section of like length shall be completed, the said president and directors shall transport all produce, or other commodities that shall be deposited convenient to said railroad or canal, and which they shall be required to transport to any

point to which the said railroad or canal may have been completed, in the order in which the company shall be required to transport the same, after it shall have been deposited convenient to said railroad or canal, so that equal and impartial justice shall be done to all the owners of produce or other commodities in the transportation thereof by the company; *Provided*, The owner of produce or other commodities required to be transported by said company on said railroad or canal or canals, shall pay or tender to said company at their toll-gate or gates, the toll due on such produce or commodities under this act; and it shall be lawful for the president and directors of the said company, and they are hereby authorized to erect on such section or sections a toll-gate or gates, and they shall be entitled to demand and receive a sum not exceeding the following rates, viz.: On goods, produce, merchandise or property transported, not exceeding four cents a ton per mile for toll, and eight cents a ton per mile for transportation; and for the transportation of passengers not exceeding six cents per mile for each passenger until the nett profits received shall amount to a sum equal to the capital stock expended, with six per centum per annum interest thereon from the time the money was advanced by the stockholders until received back in the nett profits. But when the nett profits received, as aforesaid, from the tolls aforesaid, shall have amounted to a sum equal to the capital stock expended as aforesaid, with six per centum per annum interest thereon as aforesaid, then the tolls which the said president and diretcors shall be entitled to demand and receive for the transportation of produce or other commodities on the said railroad or canal or canals, shall be fixed and regulated, from time to time, by the Governor, or such other person as may be appointed by the Legislature for that purpose, so as to make them sufficient in his or their estimation to yield a nett profit equal to ten per centum per annum on the capital stock expended in making and completing the said railroad and canal or canals, over and above what may be necessary for the repairs and renewal of the same. The president and directors of said company shall, at, or shortly before each session of the Legislature, report to the Governor, or such other person or persons as the Legislature may hereafter appoint for

that purpose, showing the whole amount of capital stock expended in the construction of the said road or canal or canals, the amount of tolls received during each year, the expenses and charges incurred during each year, and the nett annual profit or loss on the capital expended. *And it shall not be lawful for any other company or person or persons whatever to travel upon or use the road of said company, or to transport persons or property of any description along the said road*, without the license or permission of the president and directors of said company. And nothing herein contained shall be construed to prevent said company from making contracts for the transportation of the mail upon such terms as may be agreed on between said company and the agents of the United States."

An Act to incorporate the North Carolina Central Railroad Company. Enacted by the General Assembly of North Carolina. See Acts of North Carolina, 1831-2, page 46:

"XV. *And be it further enacted*, That so soon as ten miles of said road or canal shall be completed, and as often thereafter as any other section of like length shall be completed, the said president and directors shall transport all produce or other commodities that shall be deposited convenient to said railroad or canal, and which they shall be required to transport to any point to which the said railroad or canal may have been completed in the order in which the company shall be required to transport the same, after it shall have been deposited convenient to said road or canal, so that equal and impartial justice shall be done to all the owners of produce or other commodities in the transportation thereof by the Company; *Provided*, The owner of produce or other commodities required to be transported by said company on said railroad or canal or canals, shall pay or tender to said company at their toll-gate or gates, the toll due upon such produce or commodities under this act; and it shall be lawful for the president and directors of the said company, and they are hereby authorized to erect on such section or sections a toll-gate or toll-gates, and they shall be entitled to demand and receive a sum not exceeding the following rates, viz.: On goods, produce, merchandise or property transported, not exceeding four cents a ton per mile for toll, and eight cents a ton

per mile for transportation ; and for the transportation of passengers not exceeding six cents per mile for each passenger, until the nett profits received shall amount to a sum equal to the capital stock expended, with six per centum per annum interest thereon from the time the money was advanced by the stockholders until received back in the nett profits. But when the nett profits received as aforesaid, from the tolls aforesaid, shall have amounted to a sum equal to the capital stock expended as aforesaid, with six per centum per annum interest thereon as aforesaid, then the tolls which the said president and directors shall be entitled to demand and receive for the transportation of produce or other commodities on the said railroad or canal or canals, shall be fixed and regulated, from time to time, by the Governor, or such other person or persons as may be appointed by the Legislature for that purpose, so as to make them sufficient in his or their estimation to yield a nett profit equal to ten per centum per annum on the capital stock expended in making and completing the said railroad or canal or canals, over and above what may be necessary for the repairs and the renewal of the same. The president and directors of the said company shall, at, or shortly before each session of the Legislature, report to the Governor, or such other person or persons as the Legislature may hereafter appoint for that purpose, shewing the whole amount of capital stock expended in the construction of said road or canal or canals, the amount of tolls received during each year, the expenses and charges incurred during each year, and the nett annual profit or loss on the capital expended. *And it shall not be lawful for any other company or person or persons whatever to travel upon or use the road of said company, or to transport persons or property of any description along said road*, without the license or permission of the president and directors of said Company. And nothing herein contained shall be construed to prevent the said company from making a contract for the transportation of the mail upon such terms as may be agreed on between said company and the agents of the United States."

An Act to incorporate the Dover Railroad Company. Passed by the General Assembly of the State of Delaware, January

29th, 1833. See Laws of Delaware, 1833, Chapter CCXVIII., page 221:

"SEC. 5. *And be it enacted*, That the directors of said Dover Railroad Company, may procure and use, on any railroad or canal, which shall be constructed by them, in virtue of this act, all engines, machines, wagons, carriages, boats, vessels, and other vehicles, which they may deem proper or necessary, for the purposes of transportation on said road or said canal; and they shall have power to charge and receive as tolls, for using said road or for transportation thereon, any sum not exceeding the following rates, to wit: For passengers twenty-five cents, including customary baggage, of one hundred pounds or less each; for a trunk, box, bale, basket, or package, not being the baggage or part of the baggage of a passenger, and not exceeding one hundred pounds weight, twelve and a half cents; for wheat, corn, and rye, one cent and a half per bushel; for oats, and other grain, one cent per bushel; for clover seed, three cents per bushel; for molasses, one dollar per hogshead; rum and other liquors, seventy-five cents per hogshead; lime, fifty cents per hogshead; flour, twelve and a half cents per barrel; other articles, per barrel, twelve and a half cents; hogshead staves, per thousand, two dollars and twenty-five cents; barrel staves, one dollar and fifty cents per thousand; for bark, one dollar and twenty-five cents per cord; for hickory wood, one dollar and twenty-five cents per cord; oak, and other wood, per cord, one dollar; for cedar rails, one dollar and fifty cents per hundred; oak rails, two dollars; for boards and scantling, one dollar and fifty cents per thousand feet; for other articles not enumerated, not exceeding one dollar per ton; and in case said company shall cut a canal as aforesaid, to unite the waters of Little Creek with Mahon's River aforesaid, the said canal shall be free; and any improvement to be made as aforesaid, by the said company, in the navigation of Little Creek, shall be for the common benefit of the public, and shall be used and enjoyed, without any charge, imposition, or toll, by the said company; but *it shall not be lawful for any person or company to travel upon, or use any part of the said railroad, or to transport persons or property of any description thereon*, without the license or permission of the directors of the said Dover Railroad Company."

An Act to incorporate the Milford Railroad and Canal Company. Passed by the General Assembly of Delaware, February 6th, 1833. See Laws of Delaware, 1833, Chapter CCLXVIII., page 274:

"SEC. 5. *And be it enacted*, That the directors of the said Milford Railroad and Canal Company, may procure and use on any railroad or canal which shall be constructed by them in virtue of this act, all engines, machines, wagons, carriages, boats, vessels, and other vehicles which they may deem proper or necessary for the purposes of transportation on said road or said canal, and they shall have power to charge and receive as tolls for using said road or canal or for transportation thereon, any sum not exceeding the following rates, to-wit: For passengers, twenty-five cents, including customary baggage of one hundred pounds each; for a trunk, box, bale, basket, or package, not being the baggage or part of the baggage of a passenger, and not exceeding one hundred pounds weight, twelve and a half cents; for wheat, corn and rye, one and a half cents per bushel; for oats and other grain, one cent per bushel; for clover seed, three cents per bushel; for molasses, one dollar per hogshead; rum and other liquors, seventy-five cents per hogshead; lime, fifty cents per hogshead; flour, twelve and a half cents per barrel; other articles per barrel, twelve and a half cents; hogshead staves, per thousand, two dollars and twenty-five cents; barrel staves, one dollar and fifty cents per thousand; for bark, one dollar and twenty-five cents per cord; for hickory wood, one dollar and twenty-five cents per cord; oak and other wood, per cord, one dollar; for cedar rails, one dollar per hundred; oak rails, two dollars per hundred; for boards and scantling, one dollar and fifty cents per thousand feet; for untanned hides, one dollar per hundred; for other articles not enumerated, not exceeding one dollar per ton. *And it shall not be lawful for any person or company to use or travel upon any part of said railroad or canal, or to transport persons or property of any description thereon*, without the license or permission of the directors of the said Milford Railroad and Canal Company."

An Act to incorporate the New Albany and Jeffersonville Railroad Company. Passed by the General Assembly of the

State of Indiana. Approved February 1st, 1834. See Acts of Indiana, 1833, Chapter CXXXI., page 235:

"SEC. 20. That the said president and directors shall have power and authority to purchase with the funds of said company, and place on any railroad constructed by them under this act, all machines and carriages of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road; and that they shall have power to charge for tolls (and transportation of persons) on goods, produce, merchandise or property of any kind whatever, transported by them along said railroad; may charge and receive such tolls and freights for the transportation of persons, commodities, and carriages on said road, or any part thereof, as shall be for the interest of the company; and the same to change, lower or raise at pleasure; *Provided*, That the rates established from time to time, shall be posted up in some conspicuous place or places on said road; *and it shall* [not] *be lawful for any other company, or any other person or persons whomsoever, to transport any person, merchandise, produce or property of any description whatsoever, along said road or roads, or any of them, or any part thereof, without the license or permission of the president and directors of said company;* and the said road or roads, with all their works, profits, and improvements, and all machinery used on said road or roads, for transportation or other purposes, are hereby vested in said company incorporated by this act, and their successors forever; and the shares of the capital stock of said company, shall be deemed and considered personal property; reserving however, to the State the right of transporting at any time, troops, provisions, implements, and munitions of war, free of toll."

An Act to incorporate the Nashville and Cincinnati Railroad Company. Passed by the General Assembly of Tennessee, November 29th, 1852. See Acts of 1851–2, page 574:

"SEC. 21. *Be it enacted*, That the president and directors shall have power to purchase with the funds of said company, and place on any railroads constructed by them under this act, all machines, wagons, vehicles or carriages of any kind which they may deem proper for purposes of transportation on said

road, and they shall have the power to charge for tolls, and the transportation of persons, merchandise, and property of any kind whatever, transported along said railway, any sum not exceeding the following rates: For transportation or conveyance not exceeding thirty-five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger. *It shall not be lawful for any other company, or any other person or persons, to travel upon or use any of the roads of said company, or transport persons or property thereon, without the license and permission of the president and directors thereof.*"

CHAPTER III.

In the charter of the Georgia Railroad Company, and in the charters referred to in the last chapter, the exclusive right of transportation, and the right to charge for transportation, are both given in the same section; but in the charters referred to in this chapter, the exclusive right of transportation is given in a different section, from the one in which the right to charge for transportation is given.

An Act to incorporate the Evansville and Lafayette Railroad Company. Passed by the General Assembly of Indiana. Approved December 24th, 1833. Acts of Indiana, 1834, Chapter CXXVI., page 201:

"SEC. 19. That when said corporation shall have procured the right of way as hereinbefore provided, they shall be seized in fee-simple of the rights to said land, *and shall have the sole use and occupancy of the same; and no person, body corporate or politic, shall in any way interfere therewith, molest, disturb, or injure any of the rights and privileges hereby granted, or that would be calculated to detract from or affect the profits of said corporation.*"

"SEC. 23. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities, and carriages, on said road, or any part thereof, as shall be for

the interest of the company, and the same to change, lower or raise at pleasure; *Provided*, That the rates established from time to time, shall be posted up in some conspicuous place or places on said road."

An Act to incorporate the Indianapolis and Lafayette Railroad Company. Passed by the General Assembly of Indiana. Approved February 1st, 1834. See Acts of Indiana, 1834, Chapter CXXVIII., page 210:

"SEC. 19. That when said corporation shall have procured the right of way as hereinbefore provided, they shall be seized in fee-simple of the right to such land, *and shall have the sole use and occupancy of the same*, but not to interfere with the right of way of any railroad company heretofore incorporated; and *no person, body politic or corporate, shall in any way interfere with, molest, disturb or injure any of the rights or privileges hereby granted, or that would be calculated to detract from or affect the profits of said corporation.*"

"SEC. 23. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities, and carriages on said road, or any part thereof, as shall be for the interest of the company, and the same to change, raise, or lower at pleasure; *Provided*, That the rates established from time to time, shall be posted up in some conspicuous place or places on said road."

An Act to incorporate the Indiana Northwest Railroad Company. Passed by the General Assembly of the State of Indiana. Approved February 1st, 1834. See Acts of Indiana, 1834, Chapter CXXX., page 226:

"SEC. 19. That when said corporation shall have procured the right of way as hereinbefore provided, they shall be seized in fee-simple of the right to said land, *and shall have the sole use and occupancy of the same; and no person, body politic or corporate, shall in any way interfere therewith, molest, disturb, or injure any of the rights and privileges hereby granted, or that would be calculated to detract from or affect the profits of said corporation.*"

"SEC. 23. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities, and

carriages on said road, or any part thereof, as shall be for the interest of said company, and the same to change, lower or raise, at pleasure; *Provided*, That the rates established from time to time, shall be posted up in some conspicuous place or places on said road."

An Act to incorporate the Levenworth and Bloomington Railroad Company. Passed by the General Assembly of the State of Indiana. Approved February 31st, 1834. Chapter CXXIX., page 218:

"SEC. 19. That when said corporation shall have procured the right of way as hereinbefore provided, they shall be seized in fee-simple to the right to such land, *and shall have the sole use and occupancy of the same; and no person, body corporate or politic, shall in any way interfere with, molest, disturb, or injure any of the rights and privileges hereby granted, or that would be calculated to detract from or affect the profits of said corporation.*"

"SEC. 23. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities, and carriages, on said road, or any part thereof, as shall be for the interest of the company, and the same to change, lower or (raise) at pleasure; *Provided*, That the rates established from time to time, shall be posted up in some conspicuous place or places on said road."

An Act to enact with amendments an Act of the General Assembly of North Carolina, entitled, "An Act to incorporate the Albermarle Railroad Company." Passed by the General Assembly of Virginia, February 12th, 1835. See Acts of Virginia, 1834–5, page 119:

"SEC. 14. *Be it further enacted*, That so soon as the railroad be completed, the president and directors shall be entitled to demand and receive on the same the following rates of toll, to-wit: On all goods, produce, merchandise or commodity of any description whatsoever, a sum not exceeding twelve cents per ton per mile; for the transportation of the mail, such a sum as they may agree for with the agents of the government; that they shall furthermore be entitled to demand and receive for the weighing, storage, and delivering of produce and other com-

modities, rates not exceeding the ordinary warehouse rates charged in the seaport towns in this State, until the nett profits received shall amount to a sum equal to the capital stock expended, with six per cent. per annum interest thereon from the time the money was advanced by the stockholders, until received back in the nett profits; but when the nett profits received as aforesaid, by the tolls aforesaid, shall amount to a sum equal to the capital stock expended, with six per cent. interest thereon, then the toll which the said president and directors shall be entitled to demand and receive as aforesaid, shall be fixed and regulated from time to time by the president and directors, so as to make them sufficient, in their estimation, to yield a nett profit of twenty per cent. per annum on the capital stock invested in said road, and the construction connected with it, and the cost of the locomotive engines, cars, carriages and other vehicles, and the renewal and repairs of the same. The company, however, will not be bound to transport any produce or other commodities, unless the owner thereof shall pay or tender to the said company, at their toll-gate or gates, the toll due upon such commodities under this act."

"SEC. 26. *Be it further enacted*, That *it shall not be lawful for any other company, or person or persons whatever, to travel upon or use the road of said company*, or to transport persons or property of any description along the said railroad, without the license or permission of the president and directors of said company."

An Act incorporating the Rivanna and Valley Railroad Company. Passed by the General Assembly of Virginia, March 5th, 1835. See Acts of Virginia, 1834–5, page 108:

"SEC. 25. Upon the railroad hereby authorized, *the company shall have the exclusive right of transportation.* When it is completed, they shall at all times furnish and keep in good repair the necessary carriages and other requisites for the safe and convenient transportation of persons and property, and it shall be their duty, at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place of delivery on the road, which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be trans-

ported, at some place on the road, convenient for the reception thereof."

"SEC. 27. So soon as any portion of the railroad hereby authorized may be in readiness for transportation, it shall be lawful for the president and directors to transport, by their officers and agents, or by contract under them, persons and property on the same, and they shall have power to charge for the transportation of persons, goods, produce, merchandise and other articles, and for the transportation of the mail, any sum not exceeding the following rates, viz.: On persons, not exceeding eight cents per mile for each person, unless the distance which any person be transported be less than ten miles, in which case, the president and directors may be entitled to make an extra charge of fifty cents for taking up and putting down each person so transported. For the transportation of goods, produce, merchandise and other articles, not exceeding an average of ten cents per ton per mile, and for the transportation of the mail, such sum as they may agree for. And the said president and directors shall be furthermore entitled to demand and receive for the weighing, storage, and delivery of produce and other commodities, at their depots and warehouses, rates not exceeding the ordinary warehouse rates in the city of Richmond."

An Act incorporating the stockholders of the Falmouth and Alexandria Railroad Company. Passed by the General Assembly of Virginia, March 9th, 1835. See Acts of Virginia, 1834-5, page 89:

"SEC. 23. Upon the railroad hereby authorized, *the company shall have the exclusive right of transportation.* When it is completed, they shall at all times furnish and keep in good repair the necessary carriages and other requisites for the safe and convenient transportation of persons and property, and it shall be their duty at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place for delivery on the road, which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the

reception thereof. They shall give no undue preference in transportation to the property of one person over that of another, but as far as practicable, shall carry each in the order of time in which it shall be delivered or offered for transportation, with the tolls paid or tendered. If the company or any of its officers or agents shall fail to receive, transport, or deliver in due time, any property so offered or delivered to them for transportation, or shall fail to take up or set down any passenger or passengers at such point as he or she may desire, upon the payment or tender of the passage money hereby allowed, they shall forfeit and pay to the party injured double the amount of the lawful tolls paid or tendered, and shall moreover be liable to an action on the case, in which full damages and double costs shall be recovered.

"SEC. 24. So soon as any portion of the said railroad may be in readiness for transportation, it shall be lawful for the said president and directors to transport by their officers and agents, or by contractors under them, persons and property on the same, and they shall have power to charge for the transportation of persons, goods, produce, merchandise and other articles, and for the transportation of the mail, any sum not exceeding the following rates, to-wit: On persons, not exceeding eight cents per mile for each person, unless the distance which any person be transported be less than ten miles, in which case, the president and directors may be entitled to make an extra charge of fifty cents for taking up and putting down the person so transported; for the transportation of goods, produce, merchandise and other articles, not exceeding ten cents per ton per mile; and for the transportation of the mail, such sum as they may agree for; and the said president and directors shall be furthermore entitled to demand and receive, for the weighing, storage, and delivery of produce and other commodities, at their depots and warehouses, rates not exceeding the ordinary warehouse rates charged in the towns of Falmouth, Fredericksburg, and Alexandria."

An Act incorporating the stockholders of the Rappahannock and Blue Ridge Railroad Company. Passed by the General Assembly of Virginia, January 21st, 1836. See Acts of Virginia, 1835–6, page 179:

"24. Upon the railroad hereby authorized, the *said company shall have the exclusive right of transportation.* When it is completed, they shall at all times furnish and keep in good repair the necessary carriages and other requisites for the safe and convenient transportation of persons and property; and it shall be their duty at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place of delivery on the road which the owner of the goods may indicate, and there to deliver all articles which shall be intrusted to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof, or at any point at which any railroad hereafter to be constructed shall unite with the same. They shall give no undue preference in transporting to the property of one person over that of another, but, as far as practicable, shall carry each in the order of time in which it shall be delivered or offered for transportation, with the tolls paid or tendered. If the company, or any of its officers or agents, shall fail to receive, transport, or deliver in due time any property so offered or delivered to them for transportation, or shall fail to take up or sit down any passenger or passengers at such point as he or they may desire, upon the payment or tender of the passage money hereby allowed, they shall forfeit and pay to the party aggrieved, double the amount of the lawful tolls paid or tendered, and shall moreover be liable to an action on the case, in which full damages and double costs shall be recovered.

"25. So soon as any portion of the said railroad may be in readiness for transportation, it shall be lawful for the said president and directors to transport, by their officers and agents, or by contractors under them, persons and property on the same; and they shall have power to charge for the transportation of persons, goods, produce, merchandise, and other articles, and for the transportation of the mail, any sum not exceeding the following rates, to wit: On persons, not exceeding eight cents per mile for each person, unless the distance which any person be transported be less than ten miles, in which case, the president and directors may be entitled to make an extra charge of fifty cents for taking up and putting down such person; for the transportation of goods, produce, merchandise and other arti-

reception thereof. They shall give no undue preference in transportation to the property of one person over that of another, but as far as practicable, shall carry each in the order of time in which it shall be delivered or offered for transportation, with the tolls paid or tendered. If the company or any of its officers or agents shall fail to receive, transport, or deliver in due time, any property so offered or delivered to them for transportation, or shall fail to take up or set down any passenger or passengers at such point as he or she may desire, upon the payment or tender of the passage money hereby allowed, they shall forfeit and pay to the party injured double the amount of the lawful tolls paid or tendered, and shall moreover be liable to an action on the case, in which full damages and double costs shall be recovered.

"SEC. 24. So soon as any portion of the said railroad may be in readiness for transportation, it shall be lawful for the said president and directors to transport by their officers and agents, or by contractors under them, persons and property on the same, and they shall have power to charge for the transportation of persons, goods, produce, merchandise and other articles, and for the transportation of the mail, any sum not exceeding the following rates, to-wit: On persons, not exceeding eight cents per mile for each person, unless the distance which any person be transported be less than ten miles, in which case, the president and directors may be entitled to make an extra charge of fifty cents for taking up and putting down the person so transported; for the transportation of goods, produce, merchandise and other articles, not exceeding ten cents per ton per mile; and for the transportation of the mail, such sum as they may agree for; and the said president and directors shall be furthermore entitled to demand and receive, for the weighing, storage, and delivery of produce and other commodities, at their depots and warehouses, rates not exceeding the ordinary warehouse rates charged in the towns of Falmouth, Fredericksburg, and Alexandria."

An Act incorporating the stockholders of the Rappahannock and Blue Ridge Railroad Company. Passed by the General Assembly of Virginia, January 21st, 1836. See Acts of Virginia, 1835–6, page 179:

"24. Upon the railroad hereby authorized, the *said company shall have the exclusive right of transportation.* When it is completed, they shall at all times furnish and keep in good repair the necessary carriages and other requisites for the safe and convenient transportation of persons and property; and it shall be their duty at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place of delivery on the road which the owner of the goods may indicate, and there to deliver all articles which shall be intrusted to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof, or at any point at which any railroad hereafter to be constructed shall unite with the same. They shall give no undue preference in transporting to the property of one person over that of another, but, as far as practicable, shall carry each in the order of time in which it shall be delivered or offered for transportation, with the tolls paid or tendered. If the company, or any of its officers or agents, shall fail to receive, transport, or deliver in due time any property so offered or delivered to them for transportation, or shall fail to take up or sit down any passenger or passengers at such point as he or they may desire, upon the payment or tender of the passage money hereby allowed, they shall forfeit and pay to the party aggrieved, double the amount of the lawful tolls paid or tendered, and shall moreover be liable to an action on the case, in which full damages and double costs shall be recovered.

"25. So soon as any portion of the said railroad may be in readiness for transportation, it shall be lawful for the said president and directors to transport, by their officers and agents, or by contractors under them, persons and property on the same; and they shall have power to charge for the transportation of persons, goods, produce, merchandise, and other articles, and for the transportation of the mail, any sum not exceeding the following rates, to wit: On persons, not exceeding eight cents per mile for each person, unless the distance which any person be transported be less than ten miles, in which case, the president and directors may be entitled to make an extra charge of fifty cents for taking up and putting down such person; for the transportation of goods, produce, merchandise and other arti-

cles, not exceeding ten cents per ton per mile, and for the transportation of the mail, such sum as they may agree for. And the said president and directors shall be furthermore entitled to demand and receive for the weighing, storage and delivery of produce or other articles at their depots and warehouses, rates not exceeding the ordinary warehouse rates charged in the towns of Fredericksburg and Charlottesville."

An Act to incorporate the stockholders of the City Point Railroad Company. Passed by the General Assembly of the State of Virginia, January 26th, 1836. See Acts of Virginia, 1835-6, page 141:

"13. Upon the railroad hereby authorized, *the company shall have the exclusive right of transportation.* When it is completed, they shall at all times furnish and keep in good repair the necessary carriages and other requisites for the safe and convenient transportation of persons and property; and it shall be their duty at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place of delivery on the road which the owner of the goods may indicate, and their duty to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation to the property of one person over that of another, but, as far as practicable, shall carry each in the order of time in which it shall be delivered or offered for transportation with the tolls paid or tendered. If the company or any of its officers or agents, shall fail to receive, transport or deliver in due time any property so offered or delivered to them for transportation, or shall fail to take up or set down any passenger or passengers at such points as he or they may desire, upon the payment or tender of the passage money hereby allowed, they shall forfeit and pay to the party injured double the amount of the lawful tolls paid or tendered, and shall moreover be liable to an action on the case, in which full damages and double costs shall be recovered."

"14. So soon as the said railroad may be in readiness for transportation, it shall be lawful for the said president and di-

rectors to transport by their officers and agents, or by contractors under them, persons and property on the same; and they shall have power to charge for the transportation of persons, goods, produce, merchandise and other articles, and for the transportation of the mail, any sum not exceeding eight cents per mile for each person; on goods, produce, merchandise and other articles, not exceeding an average of ten cents per ton per mile, and for the transportation of the mail such sum as they may agree for. And the said president and directors shall be furthermore entitled to demand and receive for the weighing, storage and delivery of produce and other commodities at their depots and warehouses, rates not exceeding the ordinary warehouse rates charged in the town of Petersburg."

An Act incorporating the stockholders of the Louisa Railroad Company. Passed by the General Assembly of Virginia, February 18th, 1836. See Acts of Virginia, 1835–6, page 168:

"Sec. 26. Upon the railroad hereby authorized, *the company shall have the exclusive right of transportation.* When it is so completed, they shall at all times furnish and keep in good repair, or have furnished and kept in good repair, the necessary carriages and other requisites for the safe and convenient transportation of persons and property; and it shall be their duty at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place of delivery on the road which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof, or at any point at which any railroad hereafter to be constructed shall unite with the same."

"Sec. 28. So soon as any portion of the railroad hereby authorized may be in readiness for transportation, it shall be lawful for the said president and directors to transport, by their officers and agents, or by contractors under them, persons and property on the same, and they shall have power to charge for the transportation of persons, goods, produce, merchandise and other articles, and for the transportation of the mail, any sum not exceeding the following rates, viz.: On persons, not ex-

ceeding eight cents per mile for each person, unless the distance which any person be transported be less than ten miles, in which case the president and directors may be entitled to make an extra charge of fifty cents for taking up and putting down each person so transported; for the transportation of goods, produce, merchandise and other articles, not exceeding an average of ten cents per ton per mile, and for the transportation of the mail, such sum as they may agree for. And the said president and directors shall be furthermore entitled to demand and receive, for the weighing, storage and delivery of produce and other commodities at their depots and warehouses, rates not exceeding the ordinary warehouse rates charged in the city of Richmond."

An Act to enact an act of the General Assembly of North Carolina, entitled, "An Act to incorporate the Roanoke, Danville, and Junction Railroad Company." Passed by the General Assembly of Virginia, March 10th, 1836. Acts of Virginia, 1835–6, page 113:

"13. So soon as a section of ten miles of the said railroad shall be completed, and as often thereafter as any other section of like length shall be completed, the said president and directors shall transport all produce or other commodities that shall be deposited convenient to said railroad, and which they shall be required to transport, to any point to which the said railroad may have been completed, in the order in which the company shall be required to transport the same, after it shall have been deposited conveniently to the said railroad, so that equal and impartial justice shall be done to all the owners of produce or other commodities in the transportation thereof by the company; *Provided*, That the owners of the produce or other commodities required to be transported by said company on the said railroad, shall pay or tender to the said company at their depot, the toll due on such produce or other commodities under this act; and it shall be lawful for the president and directors of the said company, and they are hereby authorized, to erect on such section or sections a depot or depots, and they shall be entitled to demand and receive a sum not exceeding twelve and a half cents per ton, on two thousand pounds per mile, for transporting produce or other commodities thereon, and for

each passenger, a sum not exceeding eight cents per mile, until the net profits received shall amount to a sum equal to the capital stock expended, with fifteen per cent. per annum interest thereon from the time the money was advanced by the stockholders, until received back in the nett profits; but when the nett profits received as aforesaid by the tolls aforesaid shall have amounted to a sum equal to the capital stock expended as aforesaid, with fifteen per cent. per annum interest thereon as aforesaid, then the toll which the said president and directors shall be entitled to demand and receive for the transportation of produce or other commodities on the said railroad, shall be fixed and regulated from time to time, by the president and directors of said company, so as to make them sufficient in their estimation to yield a nett profit equal to fifteen per cent. per annum on the capital stock expended in making and completing the said railroad, over and above what may be necessary for the repairs and renewal of the same. The president and directors of said company shall, at the end of each year, report to the Legislature a statement shewing the whole amount of capital stock expended in this State in the construction of the said railroad, the amount of tolls received each year, expenses and charges incurred during each year, and the nett annual profit or loss on the capital expended.

"SEC. 24. *It shall not be lawful for any other company, or person or persons whatsoever, to travel upon or use the road of said company, or to transport persons or property of any description along the said road*, without the license or permission of the president and directors of said company; and nothing herein contained shall be so construed to prevent said company from making contract, for the transportation of the mail upon such terms as may be agreed on between said company and the agents of the United States, or to oblige them to carry the mail as common freight."

An Act to incorporate the stockholders of the Lynchburg and Tennessee Railroad Company, and to authorize them, or the James River and Kanawha Company, to construct a railroad from Lynchburg to Richmond. Passed by the General Assembly of Virginia, March 11th, 1836. See Acts of Virginia, 1835–6, page 89:

"45. Upon the railroad hereby authorized, *the company shall have the exclusive right of transportation.* They shall at all times furnish and keep in good repair the necessary carriages and other requisites for the safe and convenient transportation of persons and property; and it shall be their duty, at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place of delivery on the road, which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation to the property of one person over that of another, but as far as practicable, shall carry each in the order of time in which it shall be delivered or offered for transportation, with the tolls paid or tendered. If the company or any of its officers or agents, shall fail to receive, transport, or deliver in due time, any property so offered or delivered to them for transportation, they shall forfeit and pay to the party injured double the amount of the lawful tolls paid or tendered, and shall, moreover, be liable to an action on the case, in which full damages and double costs shall be recovered. The company shall be liable, as common carriers, for any loss or injury happening to goods in their possession, or in possession of their agents for transportation.

"46. The company may demand and receive for transportation upon their railroad such tolls as they may assess: *Provided, however,* That the tolls for transportation of persons do not exceed eight cents per mile for each person; that the tolls for the transportation of property other than the mail, do not exceed an average of ten cents per ton of two thousand two hundred and forty pounds per mile; that the tolls upon lumber, salt, Indian corn, wheat, rye, and other grain and grass seed, upon flour, corn meal and other meal, upon hemp, flax, cotton, tobacco, and all agricultural productions, shall not exceed ten cents per ton per mile; that the tolls on coal shall not exceed seven and an half cents per ton per mile, and the tolls on gypsum shall not exceed five cents per ton per mile. The tolls hereby allowed shall be in full for all transportation on the railroad, and no other compensation shall be demanded or

received by the company, except for the transportation of the mails, for which such compensation may be received as may be agreed on. Tolls may be demanded and received as soon as any part of the railroad shall be completed, and shall be provided with the necessary carriages and other requisites for safe and convenient transportation. The company may also receive reasonable compensation for the storage, weighing, and delivery of merchandise, produce and other commodities entrusted to them to be stored in the warehouses or depots; *Provided*, That such compensation shall not exceed the ordinary warehouse rates of the market town in which, or nearest to which, the goods so entrusted to them shall be stored."

An Act incorporating the stockholders of the Richmond and Petersburg Railroad Company. Passed by the General Assembly of Virginia, March 14th, 1836. See Acts of Virginia, 1835-6, page 746:

"23. Upon the railroad hereby authorized, *the company shall have the exclusive right of transportation.* When it is completed, they shall at all times furnish and keep in good repair, the necessary carriages and other requisites for the safe and convenient transportation of persons and property; and it shall be their duty at all times, upon the payment or tender of the tolls hereby allowed them, to transport to any convenient place of delivery on the road, which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation to the property of one person over that of another, but as far as practicable, shall carry each in the order of time in which it shall be delivered or offered for transportation, with the tolls paid or tendered. If the company, or any of its officers or agents, shall fail to receive, transport, or deliver in due time, any property so offered or delivered to them for transportation, or shall fail to take up or set down any passenger or passengers at such convenient point as he or they may desire, upon the payment or tender of the passage money hereby allowed, they shall forfeit and pay to the party

so injured, double the amount of the lawful tolls paid or tendered, and shall moreover be liable to an action on the case, in which full damages and double costs shall be recovered.

" 24. So soon as any portion of the railroad hereby authorized, may be in readiness for transportation, it shall be lawful for the said president and directors to transport by their officers and agents, or by contractors under them, persons and property on the same; and they shall have power to charge for the transportation of persons, goods, produce, merchandise and other articles, and for the transportation of the mail, any sum not exceeding the following rates, viz.: On persons, not exceeding eight cents per mile for each person, unless the distance which any person be transported be less than ten miles, in which case the president and directors may be entitled to make an extra charge of fifty cents for taking up and putting down each person so transported; for the transportation of goods, produce, merchandise and other articles, not exceeding an average of ten cents per ton per mile; and for the transportation of the mail, such sum as they may agree for; and the said president and directors shall be furthermore entitled to demand and receive for the wharfage, weighing, storage and delivery of produce and other commodities at their depots and warehouses, rates not exceeding the ordinary warehouse rates charged in the city of Richmond and town of Petersburg."

An Act incorporating the Chesterfield and James River Canal Railroad Company. Passed by the General Assembly of Virginia, March 22d, 1836. See Acts of Virginia, 1835–6, page 157:

"19. Upon the railroad hereby authorized, *the company shall have the exclusive right of transportation.* When it is in readiness for transportation throughout its whole length, the company shall at all times furnish and keep in good repair the necessary carriages and other requisites for the safe and convenient transportation of coal; and it shall be their duty at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place of delivery on the road which the owner of the coal may indicate, and there to deliver all coal which shall be delivered to them for transportation, or

offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation to the coal of one person over that of another, but, as far as practicable, shall carry each in the order of time in which it shall be delivered or offered for transportation, with the tolls paid or tendered. If the company, or any of its officers or agents, shall fail to transport or deliver in due time any coal so offered or delivered to them for transportation, the company shall forfeit and pay to the party injured double the amount of the lawful tolls paid or tendered, and shall moreover be liable to an action on the case, in which full damages and double costs shall be recovered.

"20. The said company shall be entitled to demand and receive for the transportation of coal on their said railroad, a compensation or toll not exceeding two cents per bushel of five pecks, until the nett profits received thereon shall amount to a sum equal to the capital stock expended, with six per centum per annum interest thereon from the time the money was advanced by the stockholders until received back in nett profits. But when the nett profits so received shall have amounted to a sum equal to the capital stock expended as aforesaid, with interest as aforesaid, then the tolls of the company shall be fixed and regulated from time to time by the Board of Public Works, so as to make them sufficient, in their estimation, to yield a nett profit equal to six per centum per annum on the capital stock expended in making said railroad, over and above what may be necessary for the renewal and repairs of the same. And the president and directors of the said company shall make an annual report to the Board of Public Works, shewing the whole amount of capital stock expended in the construction of the railroad; the amount of tolls received during each preceding year, the expenses and charges incurred during each year, and the nett annual profit or loss on the capital expended."

An Act incorporating the stockholders of the Smithfield Railroad Company. Passed by the General Assembly of Virginia, March 22d, 1836. See Acts of Virginia, 1835–6, page 194:

"15. Upon the railroad hereby authorized, *the company shall*

have the exclusive right of transportation. When it is completed, they shall at all times furnish and keep in good repair, the necessary carriages and other requisites for the safe and convenient transportation of persons and property; and it shall be their duty at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place of delivery on the road which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation to the property of one person over that of another, but as far as practicable shall carry each in the order of time in which it shall be delivered or offered for transportation, with the tolls paid or tendered. If the company, or any of its officers or agents, shall fail to receive, transport, or deliver in due time, any property so offered or delivered to them for transportation, or shall fail to take up or set down any passenger or passengers at such point as he or they may desire, upon the payment or tender of the passage money hereby allowed, they shall forfeit and pay to the party injured double the amount of the lawful tolls paid or tendered, and shall moreover be liable to an action on the case, in which full damages and double costs shall be recovered.

"16. So soon as any portion of the said railroad shall be in readiness for transportation, it shall be lawful for the said president and directors to transport by their officers and agents, or by contractors under them, persons and property on the same; and they shall have power to charge for the transportation of persons, goods, produce, merchandise and other articles, and for the transportation of the mail, any sum not exceeding the following rates, to-wit: On persons, not exceeding eight cents per mile for each person; on goods, produce, merchandise and other articles, not exceeding an average of ten cents per ton per mile; and for the transportation of the mail, such sum as they may agree for. And the said president and directors shall be furthermore entitled to demand and receive for the weighing, storage, and delivery of produce and other commodities at their depots and warehouses, rates not exceeding the ordinary rates charged in the town of Winchester."

An Act incorporating the Glen Leonard Railroad Company. Passed by the General Assembly of Virginia, March 22d, 1836. See Acts of Virginia, 1835–6, page 198:

"26. Upon the railroad hereby authorized, *the company shall have the exclusive right of transportation.* When it is completed, they shall at all times furnish and keep in good repair the necessary carriages and other requisites for the safe and convenient transportation of persons and property; and it shall be their duty at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place of delivery on the road which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation to the property of one person over that of another, but, as far as practicable, shall carry each in the order of time in which it shall be delivered or offered for transportation, with the tolls paid or tendered. If the company, or any of its officers or agents, shall fail to receive, transport, or deliver in due time any property so offered or delivered to them for transportation, or shall fail to take up or set down any passenger or passengers at such point as he or they may desire, upon the payment or tender of the passage-money hereby allowed, they shall forfeit and pay to the party injured double the amount of the lawful tolls paid or tendered, and shall moreover be liable to an action on the case, in which full damages and double costs shall be recovered.

"27. So soon as any portion of the said railroad shall be in readiness for transportation, it shall be lawful for the president and directors to transport, by their officers and agents, or by contractors under them, persons and property on the same; and they shall have power to charge for the transportation of persons, goods, produce, merchandise, timber, lumber, and other articles, and for the transportation of the mail, any sum not exceeding the following rates, to wit: On persons, not exceeding eight cents per mile for each person, unless the distance which any person be transported be less than ten miles, in which case, the president and directors may be entitled to make an

extra charge of fifty cents for taking up and setting down each person so transported; for the transportation of the mail, such sum as they may agree for; for the transportation of all articles, except timber or lumber, not exceeding an average of ten cents per ton per mile; and for the transportation of timber or lumber, such tolls as the president and directors shall from time to time prescribe."

An Act incorporating the stockholders of the Eastern Shore Railroad Company. Passed by the General Assembly of Virginia, March 22d, 1836. Acts of 1835–6, page 130:

"25. Upon the railroad hereby authorized, *the company shall have the exclusive right of transportation.* When it is completed, they shall at all times furnish and keep in good repair the necessary carriages and other requisites for the safe and convenient transportation of persons and property; and it shall be their duty at all times, upon the payment or tender of the tolls hereby allowed, to transport to any convenient place of delivery on the road which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation to the property of one person over that of another, but, as far as practicable, shall carry each in the order of time in which it shall be delivered or offered for transportation, with the tolls paid or tendered. If the company, or any of its officers or agents, shall fail to receive, transport, or deliver in due time any property so offered or delivered to them for transportation, or shall fail to take up or set down any passenger or passengers at such point as he or they may desire, upon the payment or tender of the passage money hereby allowed, they shall forfeit and pay to the party injured double the amount of the lawful tolls paid or tendered, and shall moreover be liable to an action on the case, in which full damages and double costs shall be recovered.

"26. So soon as any portion of said railroad shall be in readiness for transportation, it shall be lawful for the said president and directors to transport, by their officers and agents, or by

contractors under them, persons and property on the same; and they shall have power to charge for the transportation of persons, goods, produce, merchandise and other articles, and for the transportation of the mail, any sum not exceeding the following rates, to wit: On persons, not exceeding eight cents per mile for each person, unless the distance which any person be transported be less than ten miles, in which case the president and directors may make an extra charge of fifty cents for taking up and putting down each person so transported; for the transportation of goods, produce, merchandise and other articles, not exceeding an average of ten cents per ton per mile, and for the transportation of the mail, such sum as they may agree for. And the president and directors shall be furthermore entitled to demand and receive, for the weighing, storage, and delivery of produce and other commodities at their depots and warehouses, rates not exceeding the ordinary warehouse rates charged in the city of Philadelphia."

An Act to incorporate the Metropolitan Railroad Company. Passed by the General Assembly of South Carolina, December 19th, 1838. Statutes of South Carolina, Volume VIII., page 470:

"SEC. XXII. Upon the road hereby authorized, *the company shall have the exclusive right of transportation;* when it is completed they shall, at all times, furnish and keep in good repair the necessary carriages and other requisites for the safe and convenient transportation of persons and property; and it shall be their duty, at all times, upon the payment or tender of the tolls hereby allowed, to transport to any depot on the road which the owner of the goods may indicate, and there to deliver, all articles which may be delivered to them for transportation, or offered to them in proper condition to be transported."

"SEC. XXIV. So soon as any portion of the railroad hereby authorized may be in readiness for transportation, it shall be lawful for the said president and directors to transport, by their officers or agents, or by contractors under them, persons and property on the same; and they shall have power to charge for the transportation of persons, goods, produce, merchandise

and other articles, and for the transportation of the mail, any sum not exceeding the following rates: On persons, not exceeding seven and one-half cents per mile for each person, unless the distance which any person may be transported be less than ten miles, in which case the president and directors may be entitled to make an extra charge of fifty cents for taking up and putting down each person so transported; for the transportation of goods, produce, merchandise, and other articles, not exceeding fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles; and for the transportation of the mails, such sums as they may agree for."

CHAPTER IV.

In this charter of the Georgia Railroad Company, and in all of the other charters referred to above, the exclusive right of transportation, and the right to charge for transportation were both given in the original charters of the companies. But in the charters referred to in this chapter, the railroads were originally declared to be public highways, open to all persons upon payment of tolls, and the exclusive right of transportation was not given to the companies until sometime afterward when the charters were amended.

"An Act to authorize the New Castle and French Town Turnpike Company, heretofore incorporated by the name of the President, Managers, and Company of the New Castle and French Town Turnpike, to make a railroad from the place called and known by the name of Clark's Corner, in the County of New Castle, in this State, as far as the Maryland line, in a direction towards French Town, on Elk River." Passed by the Legislature of Delaware, February 7th, 1829. See Laws of Delaware, 1827–9, page 323:

"SEC. 6. *And be it enacted*, That the said directors may procure and use on any railroad which shall be constructed by

them in virtue of this act, all machines, wagons, carriages and other vehicles, which they may deem proper, or necessary for the purposes of transportation on said road, and they shall have power to charge and receive as tolls for using the said railroad, not exceeding three cents per ton per mile, for the transportation of passengers, not more than twenty-five cents each, for the whole distance, including customary baggage, not exceeding one hundred pounds weight for each; for transporting the whole distance any trunk, box, bale, basket or package, not being the baggage or part of the baggage of a passenger, and not exceeding one hundred pounds weight, twelve and a half cents; and it shall not be lawful for any other company or any person or persons whatsoever, to travel upon or use any part of the said railroad, or to transport persons or property of any description thereon, without the payment of the tolls by this section required, and using appropriate and suitable carriages for traveling and passing on said railroad; *Provided, however, and be it enacted,* That *this section shall not be so construed as to prevent all or any persons or companies from making or procuring all machines, wagons, carriages and other vehicles proper or necessary for the purposes of transportation on said railroad.*"

The act last mentioned was amended by an act passed by the Legislature of Delaware, January 16th, 1830. See Laws of Delaware, 1830-3, page 7. The amendment was entitled, "A Supplement to the act entitled, 'An Act to authorize the New Castle and French Town Turnpike Company, heretofore incorporated by the name of the president, managers and company of the New Castle and French Town Turnpike, to make a railroad from the place called and known by the name of Clark's Corner, in the County of New Castle, in this State, as far as the Maryland line, in a direction toward French Town, on Elk River.'"

"SEC. 2. *And be it further enacted,* That the directors of the said New Castle and French Town Turnpike and Railroad Company, may procure and use on any railroad which shall be constructed by them in virtue of the act, to which is a supplement, all machines, wagons, carriages, and other vehicles which they may deem proper or necessary for the purposes of trans-

portation on the said road; and they shall have power to charge and receive as tolls for using the said road, not exceeding three cents per ton per mile; for the transportation of passengers, not more than five cents per mile, including customary baggage, not exceeding one hundred pounds weight for each; for transporting the whole distance, any trunk, box, bale, basket or package, not being the baggage or part of the baggage of a passenger, and not exceeding one hundred pounds weight, twelve and one-half cents; *and it shall not be lawful for any other company, or any person, or persons whatever, to travel upon, or use any part of the said railroad, or to transport persons or property of any description thereon, without the license or permission of the said directors.*"

An Act to incorporate the Philipsburg and Juniata Railroad Company. Passed by the General Assembly of Pennsylvania. Approved March 16th, 1830. See Acts of Pennsylvania, 1829–30, page 90:

"SEC. 20. *And be it further enacted by the authority aforesaid*, That on the completion of the said railroad, the same shall be esteemed *a public highway, free for the transportation of all commodities*, and the said company may charge and receive tolls, and for freights, on and for the transportation of goods, wares, and merchandise, at the following rates—that is to say, on each ton of coal, two cents per mile; on each ton of charcoal, four cents per mile; on each ton of iron ore, salt, gypsum, and lime, two cents per mile; on brick, per thousand, on lumber, squared and round, per one hundred feet, solid, two cents per mile; on boards, planks, scantling, or other sawed stuff reduced to inch stuff, two cents per one thousand feet per mile; on shingles per thousand, one cent per mile; on staves and heading for pipes and hogsheads per mile, two cents per thousand, and staves and heading for barrels and other vessels of less size, one cent per mile per thousand; on each ton of pig metal, three cents per mile; on all other articles not enumerated, four cents per ton per mile; on all single and detached articles weighing less than a ton, it shall be lawful to charge and receive on the transports thereof an advance of twenty per centum on the rates as above established; *Provided*, That whenever the aforesaid tolls shall

exceed fifteen per centum on the capital expended, they shall be so reduced as not to exceed that amount; *Provided also*, That every person or persons using the said road shall only use those carriages and wagons and conveyances which shall be adapted thereto, which said carriages, wagons, and conveyances to be used thereon for the transportation of persons or commodities shall be prescribed by the said company."

An Act to amend an act, entitled "An act to incorporate the Philipsburg and Juniata Railroad Company. Passed by the General Assembly of Pennsylvania. Approved April 10th, 1834. See Acts of Pennsylvania, 1834, page 264:

"SEC. 3. As soon as the said president and managers shall have provided the necessary machines, wagons, vehicles, and carriages for the purposes of transportation, *it shall not be lawful, for any individual, to place on the said railroad any other machines, wagons, vehicles or carriages, or to transport in the same, except by virtue of a license from the said president and managers and their authorized agents*, who shall be entitled to grant the privilege of transporting on their railroad, on such terms and conditions and under such regulations as may seem to them proper."

CHAPTER V.

The charter of the Georgia Railroad Company enacts that said company shall have the exclusive right of transportation, "*provided*" that the charge for transportation does not exceed certain rates.

In the charters referred to in this chapter, the companies are given the exclusive right of transportation, "*and*" the right to charge for transportation, not exceeding certain rates. It is manifest that the word "*provided*," as used in the charter of the Georgia Railroad Company, was used in the same sense as the word "*and*" was used in the charters referred to in this chapter.

An Act to incorporate certain societies; and for other purposes. Passed by the General Assembly of the State of South Carolina, December 17th, 1831. Statutes of South Carolina, Vol. VIII., pages 373 and 374:

"SEC. XII. John McLean, of the town of Columbia, is hereby vested with the exclusive right, for twenty-one years, to construct a railroad from the Columbia bridge, along the public streets, to any part of the town of Columbia; and when the same or any part thereof is finished, *with exclusive right to transport thereon*, from and to any part of said road, any article of merchandise, trade, or produce; AND *to charge for transportation*, not exceeding eight cents for a bale of cotton, eight cents for a sack of salt, fifty cents for a hogshead, eight cents for a barrel, and for all other articles not exceeding two and a half cents per hundred pounds; *Provided*, The said John McLean, or those who hold under him, in the construction and continuance of such road, shall not obstruct nor in anywise hinder the free passage of the streets of said town, nor use any locomotive engine upon such road; *And provided, also*, The said work shall be commenced within six months, and completed within two years after the passing of this act.

"SEC. XIII. William Lang, Thomas Lang, and John Boykin, sen., proprietors of the Camden Boat Landing, are hereby invested with the exclusive privilege, for twenty-one years after its completion, to construct a railroad from the Camden boat landing to any part of the town of Camden, along the public highway and the streets of the said town; and when the same, or any part thereof, is finished, with *exclusive right to transport thereon*, from and to any part of said road, any article of merchandise, trade or produce, AND *to charge for transportation*, not exceeding ten cents for a bale of cotton, eight cents for a sack of salt, fifty cents for a hogshead, ten cents for each barrel, and for all other articles not exceeding three cents per hundred pounds; *Provided*, The said William Lang, Thomas Lang, and John Boykin, sen., or those who hold under them, in the construction and continuance of said road, shall not obstruct, nor in anywise hinder, the free passage of the streets of said town; and also, that said work shall be commenced within twelve months, and completed within three years after the passage of this act."

An Act to incorporate the Western Railroad Company. Passed by the General Assembly of Georgia. Approved December 26th, 1835. See Prince's Digest, Laws of Georgia to 1837, page 346:

"SEC. X. The said Western Railroad Company shall have the sole and *exclusive right of transportation* and conveyance of persons, produce, merchandise, and all other things over and along said railroad, to be by them constructed, as long as they shall see fit to exercise such sole and exclusive right. And the said company, in the exercise of their right of carriage and transportation, shall be regarded as common carriers, and be liable as such; AND *said company shall be authorized to fix, by by-laws, the charges and rates of transportation* and carriage on said railroad; *Provided*, Said rates shall not exceed the sum of three-fourth of a cent per mile for every hundred pounds on heavy articles, and four cents per cubic foot for every twenty-five miles on other articles, and five cents per mile for every passenger. And said railroad company shall be authorized to make all by-laws and regulations touching said road and the uses and the business thereof, which may be deemed expedient; *Provided*, The same be not repugnant to the provisions of this charter, nor to the laws and Constitution of this State or of the United States."

An Act to authorize the formation of the Charleston, Georgetown and All-Saints Railroad Company. Passed by the General Assembly of South Carolina, December 19th, 1838. See Statutes of South Carolina, Vol. VIII., page 477:

"SEC. XIII. *And be it further enacted*, That the said company shall, at all times, have *the exclusive right of conveyance or transportation* of persons, merchandise, and produce, over the railroad to be by them constructed, while they see fit to exercise the exclusive right; AND *the said company are hereby authorized to fix and determine upon such rates of charge for the transportation of persons, merchandise, and produce*, as to them shall seem necessary and proper to secure a reasonable and adequate return upon the capital invested; *Provided*, That the average annual yield on such capital, after all expenses are paid, shall not exceed ten per centum. The said company may, when they see fit, let or farm out all, or any part of their exclusive right of

transportation of persons, merchandise, and produce, with their privileges, to any individual or individuals, or other company, and for such terms as may be agreed upon; subject, always, to the proviso contained in this section, in relation to the rates of charge. And the said company, in the exercise of their right of conveyance and transportation of persons, or property, and the persons so taking from the company the right of conveyance or transportation, so far as they act in the same, shall be regarded as common carriers. And the said company may use or employ any section of their proposed railroad, before the whole shall be completed, which may afford public accommodation for the conveyance of persons, produce, or merchandise; and the said company shall have power to take, at the storehouses they may establish or annex to the said railroad, all goods, wares, merchandise, and produce, intended for transportation or conveyance, prescribe the rules of priority, and charge such reasonable prices and compensation for storage and labor, as they may, by regulations, establish, which regulations they shall publish, or as may be agreed upon with the owners."

An Act to incorporate the Greeneville and Frenchbroad Railroad Company. Passed by the General Assembly of Tennessee, November 30th, 1853. See Acts of Tennessee, 1853-4, page 705:

"SEC. 12. *Be it further enacted*, That said company shall, at all times, have *the exclusive right of conveyance or transportation* of persons, merchandise and produce over the railroad to be by them constructed, while they see fit to exercise such right; AND *said company are hereby authorized to fix and determine the rates of charge for the transportation* of persons, merchandise and produce, so as to secure a reasonable and adequate return upon their capital invested, not to exceed the average annual yield on such capital, after paying all expenses of twenty per centum. The said company may, at their discretion, let or farm out all or any part of their exclusive right of transportation of persons, merchandise and produce, with their privileges to any individual or individuals, or other company, and for such terms as may be agreed upon, subject, always, to the provision contained in this section in relation to the rates of charge; and the said company, in the exercise of their right of conveyance and transportation

of persons or property, and the persons so taking from the company the right of conveyance or transportation, so far as they act on the same, shall be regarded as common carriers; and the said company may use or employ any section of their proposed road, before the whole shall be completed, which may afford public accommodation for the conveyance of persons, merchandise and produce; and the said company shall have power to take at the storehouses they may establish or annex to the said railroad, all goods, wares, merchandise and produce intended for transportation or conveyance, prescribe the rules of priority, and charge such reasonable prices and compensation for services and storage, as they, by public regulations, establish, or as may be agreed upon with the owners."

"SEC. 13. *Be it further enacted*, That whenever the said company shall see fit to farm out as aforesaid, to any person or persons, or body corporate, any part of their exclusive right of conveyance and transportation, or shall deem it expedient to open said railroad or any part thereof, to public use, they shall and may adopt and enforce all necessary rules and regulations; prescribe the construction and size, or burthen of all carriages and vehicles, and the materials of which they shall be made, that shall be used on said road, and the locomotive power that shall be applied to or used with them."

Respectfully submitted,
ED. BAXTER,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE GEORGIA RAILROAD AND BANKING COMPANY,

PLAINTIFF IN ERROR,

—vs.—

James M. Smith, Campbell Wallace, and Leander Trammell, Railroad Commissioners of Georgia, and Clifford Anderson, Attorney-General of Georgia,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF ON MOTION TO DISMISS.

ED. BAXTER,
OF COUNSEL FOR PLAINTIFF IN ERROR.

BRIEF

ON MOTION TO DISMISS.

PART I.

STATEMENT OF FACTS RELATING TO SAID MOTION.

SECTION 1. The plaintiff in error, the Georgia Railroad and Banking Company, was incorporated by an act of the Legislature of Georgia in 1833. The twelfth section of the charter provides that said company "shall at all times have the exclusive right of transportation, or conveyance, of persons, merchandise and produce, over the railroad, and railroads, to be by them constructed, while they see fit to exercise the exclusive right: *Provided*, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles, and five cents per mile for every passenger: *Provided always*, That the said company may, when they see fit, rent, or farm out, all or any part of their said exclusive right of transportation or conveyance of persons, on the railroad, or railroads, with the privilege to any individual, or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned."

Transcript, top page 22.

SEC. 2. On May 7th, 1881, said company "rented and farmed out" to Wm. M. Wadley and his assigns, for the term of ninety-nine years, "all its privileges, general and exclusive, of transporting persons, merchandise, produce, and every kind of property whatsoever, which is, or may become the subject of

railroad transportation over the lines of railroad owned or controlled (by said company), to the full extent that (said company) has and enjoys, or is now entitled to have and enjoy, or may hereafter acquire the right to have and enjoy, such privileges, and subject to all the obligations and duties imposed by its charter, in this behalf, upon (said company)."

Said company "also rented and farmed out" to (said Wadley), for the aforesaid term of ninety-nine years, "as the means of full enjoyment of the privileges hereinbefore rented and farmed out," all the railroads and branches belonging to said company, together with the rights of way, road-beds, depots, stations, warehouses, elevators, work-shops, wells, cisterns, water tanks, and other appurtenances of said railroad and branches.

Transcript, top page 25.

The said Wadley agreed to pay said company $600,000 per annum during said term of ninety-nine years; and to pay all taxes on the property and franchises farmed out.

Transcript, top page 27.

It was agreed that said Wadley should not have the right to do, or omit any thing, which would furnish a ground for forfeiture of the charter of said company; and that said company should have the right to enter upon, and resume possession of all its property, for the breach of any of the covenants or agreements in the contract between them.

Transcript, top page 29.

SEC. 3. The Legislature of Georgia passed an act, approved October 14th, 1879, entitled "An Act to provide for the regulation of railroad freight and passenger tariffs in this State, to prevent unjust discrimination and extortion in the rates charged for transportation of passengers and freights, and to prohibit railroad companies, corporations, and lessees in this State, from charging other than just and reasonable rates, and to punish the same, and prescribe a mode of procedure, and rules of evi-

dence, in relation thereto; and to appoint commissioners, and to prescribe their powers and duties in relation to the same."

Transcript, top page 23.

Section five of said act provides that said commissioners "shall make reasonable and just rates of freight and passenger tariffs, to be observed *by all railroad companies* doing business in this State on the railroads thereof."

Section six of said act authorizes and requires said commissioners "to make for each of the *railroad corporations* doing business in this State, as soon as practicable, a schedule of just and reasonable rates of charges, for the transportation of passengers and freights and cars on each of said railroads; and said schedule shall, in suits brought against any such *railroad corporations*, wherein is involved the charges of any such *railroad corporations* for transportation of any passenger, or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State, as sufficient evidence that the rates therein fixed, are just and reasonable rates of charges, for the transportation of passengers, and freights, and cars, upon the railroad; and said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules."

Section nine of said act provides that "if any *railroad company* doing business in this State by its agents or employes, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal officer thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such *company* shall incur a penalty for each offense of not less than one thousand dollars, nor more than five thousand dollars, to be fixed by the presiding judge;" which penalty is to be sued for by the State.

Section ten of said act provides that if any *railroad company* doing business in this State shall, in violation of any rule or regulation provided by the commissioners aforesaid, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, * * * and the damages to be recovered shall be the same as in actions between individuals, except that in cases of willful violation of law, such *railroad companies* shall be liable to exemplary damages.

See argument in chief of Jos. B. Cummins, pp. 33, 34.

In pursuance of said act a board of commissioners was constituted, designated "The Railroad Commission," and three of the defendants in error constitute said board. The said board have assumed, and still assume, to prescribe rates of freight, and passenger tariffs, less than the maximum of those prescribed in the twelfth section of the charter of the Georgia Railroad and Banking Company, and to make such rates binding upon said company.

On October 27th, 1882, said board made and issued what is known as Circular No. 31, fixing certain rates of freight to be charged by said company on cotton, which rates are far below the maximum rates allowed by said charter.

Transcript, top page 23–31.

SEC. 4. On November 23d, 1882, said Georgia Railroad and Banking Company, and Wm. O. Wadley, executor of said Wm. M. Wadley, filed a bill in the Superior Court of Fulton County, Ga., against the defendants in error, insisting that said Act of October 14th, 1879, and said Circular No. 31, issued in pursuance of said act, were violative of Paragraph 1, Section 10, Article I. of the Constitution of the United States, which prohibits a State from passing any law impairing the obligations of a contract; it being contended that the twelfth section of the charter of said company contained a contract between the State of Georgia and said company, to the effect that said company

should have the right to charge any rates of freight and passenger tariffs not exceeding those limited in said twelfth section.

The said Superior Court dismissed the bill; and its decree having been affirmed by the Supreme Court of the State, the Georgia Railroad and Banking Company alone prosecuted a writ of error to this Court; and without having a "summons and severance" as to Wm. O. Wadley, executor, or any equivalent proceeding.

At the October Term, 1887, of this Court, the defendants in error moved to dismiss the case, and the writ of error therein—

1. Because the plaintiff in error, *the Georgia Railroad and Banking Company, has no interest in the subject-matter of the suit;* the said company having, before the bill was filed, leased, farmed out, and assigned all its rights of every kind, in and to the use of its railroad, and to the transportation and conveyance of passengers, produce, and merchandise thereon, to Wm. M. Wadley, for a period of ninety-nine years.

2. Because *Wm. O. Wadley, executor, did not join in the writ of error,* by which this case was brought to this Court; notwithstanding he was one of the complainants in the courts below, *and is the only person interested in the rates of fare to be charged for the transportation and conveyance of passengers, produce, and merchandise on and over said railroad.*

PART II.

Argument on the Motion to Dismiss.

Sec. 5. It will be noticed that both grounds of the motion assume that the Georgia Railroad and Banking Company *has no interest in the suit*, because it has farmed out its rights of transportation, and its right to use its railroad, to Wm. M. Wadley for a period of ninety-nine years.

As the contract of May 7th, 1881, between said company and said Wadley has been treated by all the parties as a valid technical lease, the question arises as to whether the lessor company has retained such an interest in the franchises conferred by the charter, as to enable it to sue for a violation of them.

It has been decided by this Court, that even where a railroad company is expressly authorized to lease its road, such lease does not discharge the company from its corporate liabilities.

113 *U. S.*, 424, *C. & N. W. R. R. vs. Crane.*

The franchises of a corporation are conferred upon it, to enable it to perform its corporate duties.

17 *How.* (39), *Y. & M. R. R. vs. Winans.*
101 *U. S.*, 84, *Thomas vs. R. R. Co.*

If, then, the lease of a railroad does not discharge the lessor company from its corporate liabilities, and does not relieve it from the performance of its corporate duties, it follows, necessarily, that the lessor company must retain such an interest in, and control over, its corporate franchises, as will enable it to properly perform those duties.

Notwithstanding the lease, the Georgia Railroad and Banking Company remains bound to the public, to keep its road and

equipment in a safe and suitable condition, and to transport passengers and freights over its road promptly, and at legal rates of charge; and if the company remains liable to perform those corporate duties, it must continue to have such an interest in the franchise to charge for transportation, as will enable it to earn money enough from the road, to keep it in proper repair.

Whether the company operates its road by its own officers, or through a lessee, it must have such an interest in its franchises, as will enable it to protect them from destruction.

The Act of October 14th, 1879, directs that the rates established by the Railroad Commissioners shall "be observed by the *railroad companies;*" the commissioners are authorized to make rates "for each of the *railroad corporations;*" the penalties imposed in favor of the State, are imposed upon "*railroad companies;*" and the suits authorized to be brought by individuals are to be brought against "*railroad companies.*"

It would be a harsh doctrine to hold a lessor "*railroad company*" liable to the suits and penalties provided for by said act, and yet deny to the company such an interest in its own franchises, as is necessary to enable the company to properly operate its road.

SEC. 6. "Where an injury is of a *permanent nature*, and *deteriorates the marketable value of the property, so that if the landlord or reversioner was to sell it, it would fetch less money in the market*, there is a damage to the reversionary estate in respect of which *the reversioner may maintain an action on the case.*"

Addison on Torts, *p.* 278.
Dicey on Parties, *p.* (340).
Wood, Landlord and Tenant, *p.* 915, *note* 1.
1 *Dutch* (*N. J.*) 263, 265, *Tinsman vs. Railroad Company.*

"If any one *interferes with his tenants so far as to disturb their enjoyment*, and thereby causes a loss of rent, or other damage, the landlord may have an action."

Taylor, Landlord and Tenant, § 173.
4 *Dev.* (*N. C.*), 478, 479, *Ott vs. Grice.*

"In contemplation of law the rent issues out of the land; *and whatever impairs the productiveness of it, decreases the landlord's security;* besides *the market value of the reversion would be greatly lessened* by an apparent injury which would permanently affect the property, or saddle the purchaser of the reversion with a lawsuit."

7 *Watts & Serg.*, 14, *Ripka vs. Sergeant.*

It is quite clear that if the State of Georgia should be allowed to reduce the rates of the plaintiff in error, below the maximum specified in the charter, and it should be understood in the community, that the State has an arbitrary discretion in regard to fixing such rates, the company "could not sell its reversionary interest" in the road, to-day, for any thing near what it would bring, if the right of the company to charge its charter rates should be sustained.

It is equally clear that the reduction of said rates below the charter limit, is such "an interference with the company's tenant, as to disturb his enjoyment of the property;" and it may be carried to a point where it will bankrupt the tenant, and "cause a serious loss of rent" to the company.

It is also clear that the right claimed by the State of Georgia to reduce the rates below the charter limit, "impairs the productiveness of the road, and decreases the company's security."

The rental of $600,000 per annum will, in ninety-nine years, aggregate $59,400,000. The only security for the payment of this immense rental, provided for in the lease, is a collateral deposit of $1,000,000 of United States bonds.

With the exception of that deposit, and the personal responsibility of Wadley, the lessor company has no security for the payment of the rental, except the future earnings of the road; and if the State can reduce those earnings at pleasure, the company's chances of collecting the rental in the future will be seriously jeopardized.

SEC. 7. "For encroachments *under a claim of right, that is inconsistent with reversionary rights, the reversioner may have his action*, though the immediate injury is merely nominal."

28 *Penn. St.*, 184, *Schnable vs. Koehler.*

The landlord or reversioner can sue for any act of a permanent nature which "*throws a doubt upon his title;*" or which operates "*in denial of his right.*"

Dicey on Parties, *p.* (340).
Wood, Landlord and Tenant, *p.* 916, *n.* 2.
28 *Penn. St.*, 184, *Schnable vs. Koehler.*
3 *Car. and Pay.* (617), *Shadwell vs. Hutchinson.*

One reason for this rule is, that "as *the reversioner is bound by lapse of time*, when he is knowing of an encroachment upon *a privilege belonging to the inheritance*, it would be great injustice not to allow him to preserve his rights by maintaining an action during the continuance of the particular estate."

Angell, Water-courses, § 398.
1 *Bing., N. C.* (555), *Bower vs. Hill.*
5 *C. B.* (*N. S.*), (511), (512), *Metropolitan vs. Petch.*
11 *East.* (375), *Daniel vs. North.*
7 *Watts and Serg.*, 13, *Ripka vs. Sergeant.*
Angell, Water-courses, § 234.

Another reason is that the reversioner "*might have great difficulty in proving his right*, when he came into possession at the expiration of the lease."

Addison on Torts, *pp.* 140, 141.
2 *Barn. and Ad.* (98), *Shadwell vs. Hutchinson.*
5 *C. B.* (*N. S.*), (512), (513), *Metropolitan vs. Petch.*
1 *Dutch* (*N. J.*), 263, *Tinsman vs. Railroad.*
3 *Car. and Pay.* (617), *Shadwell vs. Hutchinson.*

And another reason is that an acquiescence by a reversioner, for a long period of time, in an encroachment upon his reversionary rights, *would lead to an opinion on the part of the public*

that he had no rights, or that he had abandoned them; the *value of his reversionary interest would be lowered in public estimation*, and pecuniary loss would follow.

Addison on Torts, p. 141.

It is evident that the claim asserted by the State of Georgia, to reduce the rates below the charter maximum, is "a claim of right, inconsistent with the reversionary rights" of the company; and if the company should stand by in silence for ninety-nine years, and allow the State to enforce its claim against the lessee, during all that time, the great laches, if not held to be an absolute bar, would be treated by the courts as a serious objection to granting the company any relief.

But what is of more practical, and immediate importance to the company, is, that the public would conclude, from a few years of acquiescence by the company, that it had conceded to the State the right to reduce the rates, and such an opinion, in the public mind, whether well founded or not, would seriously injure the company's reversionary interest in the road.

SEC. 8. "The reversioner may maintain an action for any disturbance, *which, without any further interference by the act of man*, would, *in the ordinary course of things*, continue to be so, on the determination of the particular estate."

Angell, Water-courses, § 398.
Taylor, Landlord and Tenant, § 173.

"*Though it may be possible that an injurious act may be remedied during the term of the tenant*, yet, if it is of a permanent character, *it is to be assumed that it will remain*, unless something is done to remedy it; and it is therefore treated as an injury to the reversion or inheritance."

Dicey on Parties, pp. (341), (342), (343).
14 *East.* (490), (491), *Queen's College vs. Hallett.*
1 *Dutch* (*N. J.*), 262, *Tinsman vs. R. R. Co.*
Addison, Torts, p. 67.

The Act of October 14th, 1879, and Circular No. 31, issued in pursuance thereof, are both permanent in form, as well as in substance; and they will, "in the ordinary course of things," remain in force, until said act is repealed by the Legislature, or said circular is revoked by the Railroad Commission of Georgia.

Unless there be some "further interference by the act of man"—as by the repeal of said statute, or by the revocation of said circular, the claim asserted by the State of Georgia to reduce the company's rates below the charter maximum, will continue until the determination of the lease to Wadley.

I submit therefore, with great confidence, that the Georgia Railroad and Banking Company, has, notwithstanding the lease, such "an interest in the subject-matter of the suit," as entitles it to maintain the bill filed in this case; and therefore that the first ground of the motion to dismiss is not tenable.

SEC. 9. As to the second ground of said motion, viz., that "William O. Wadley, executor, did not join in the writ of error."

I find it to be well settled that where a judgment or decree is *joint*, all the parties affected thereby must join in the writ of error, or appeal; or there must be "a summons and severance," or its equivalent.

119 *U. S.*, 163, *Hanrick vs. Patrick.*
108 *U. S.*, 14, *Feibelman vs. Packard et al.*
20 *Wall.*, 156–7, *Simpson vs. Greeley.*
12 *Wall.*, 261, *Germain vs. Mason.*
10 *Wall.*, 417, *Masterson vs. Herndon.*
6 *Wall.*, 362, *Massina vs. Cavazos.*
20 *How.*, 289, *Same vs. Same.*
16 *Pet.*, 523, *Todd vs. Daniels.*
12 *Pet.*, 141, *Wilson vs. Insurance Company.*
7 *Pet.*, 402, *Owings vs. Kincannon.*
11 *Wheaton*, 415, *Williams vs. Bank.*

But I also find it to be equally well settled, that if the judgment or decree is joint only *in form*, and *is severable in fact, and in law*, either of the parties against whom it is rendered, may sue out a writ of error, or appeal, without joining the others, and without having a "summons and severance," or its equivalent.

119 *U. S.*, 163–4, *Hanrick vs. Patrick.*

The question then, in all cases is, whether the particular judgment or decree, under consideration, is, "*in fact and law*," joint or severable, whatever may be its mere form.

It has been held that a judgment or decree is *joint* in "*fact and in law:*"

(1) Where all the defendants are directly or indirectly affected by the judgment or decree.

20 *Wall.*, 158, *Simpson vs. Greeley.*

(2) Where each defendant is interested in every part of the judgment or decree.

20 *Wall.*, 158, *Simpson vs. Greeley.*

(3) Where a judgment or decree in ejectment is rendered against several defendants for the recovery of certain lands.

20 *Wall.*, 158, *Simpson vs. Greeley.*
13 *Wall.*, 187-8, *Hampton vs. Rouse.*
10 *Wall.*, 416, *Masterson vs. Herndon.*

(4) Where persons sue as partners, and the judgment or decree is rendered against them.

180 *U. S.*, 14, *Feibelman vs. Packard.*

(5) Where a joint judgment, upon a joint action, for money loaned, was rendered against several defendants.

11 *Wheat.*, 414, *Williams vs. Bank.*

(6) Where a joint decree was rendered against the widow and heirs of a deceased mortgagor, for the sale of mortgaged premises.

12 *Pet.*, 140–1, *Wilson vs. Insurance Co.*

(7) Where a decree was rendered against several defendants, directing them to convey and release to the complainant, all their right, title, and interest in a certain tract of land.

7 *Pet.*, 402, *Owings vs. Kincannon.*

I regard the cases cited in paragraphs 3, 4, 5, 6, and 7 as mere illustrations of the general principle announced in paragraphs 1 and 2; and I think they show, that in order to establish that "each defendant is interested in every part of a judgment or decree;" or that "all the defendants are directly or indirectly affected by a judgment or decree;" it must appear that the defendants' interest is some such close and intimate connection, as that which exists between tenants in common, joint tenants, joint contractors, co-parceners, co-partners, etc.; and I have been unable to find any application of the rule to any other than that class of interests.

I think that no such interest or connection existed between Wadley and the Georgia Railroad and Banking Co., as will be found in the cases cited above in paragraphs 1 to 7, inclusive.

On the other hand, it has been held that a judgment or decree is "*severable* in *fact and in* law:"

(*a*) Where only one of several defendants is affected by the judgment or decree.

20 *Wall.*, 157, *Simpson vs. Greeley.*

(*b*) Where a joint *and several* judgment, was rendered against A and B, and judgments were rendered against C and D severally, in the same entry.

6 *Pet.*, 172, *Cox vs. United States.*

(*c*) Where there was only one litigation in *form*, but there were in *fact* two suits; "the one being interjected in the other;" in which *the parties were different; the titles were different; and the interests were different.*

119 *U. S.*, 163, *Hanrick vs. Patrick.*

(*d*) Where the judgment against A and B, though rendered against both of them, was construed as a judgment against A *for the title asserted by him;* and as a judgment against B, *for the title asserted by him.*

119 *U. S.*, 163, *Hanrick vs. Patrick.*

(*e*) Where a decree adjudged that several deeds made by a bankrupt were fraudulent, a vendee in one of the deeds, was allowed to appeal alone.

6 *How.*, 203, *Forgay vs. Courced.*

(*f*) Where a decree was rendered against one as principal, and against the other defendants in aid of him, for distinct portions of the purchase-money, received by them under a certain contract of sale, made by him, he was allowed to continue to prosecute an appeal, after they had abandoned it. The court said, "*he has, or at least may have, a distinct and independent interest in the controversy, in respect to which he is entitled to be heard.*"

16 *Pet.*, 523, *Todd vs. Daniel.*

(*g*) Where a judgment *in personam* was rendered against one, for a sum of money, which the judgment, at the same time, established as a paramount lien upon real estate, claimed by the other defendants, the one against whom the personal judgment was rendered, was allowed to prosecute a writ of error, without joining the others, because, as the court said, "*they have no interest*" in the personal judgment rendered against him.

12 *Wall.*, 261, *Germain vs. Mason.*
15 *Wall.*, 8, 9, *R. R. vs. Johnson.*

The legal status of the Georgia Railroad and Banking Company and Wadley's executor, as the same existed at the filing of

the bill in this case, is correctly stated on top pages 5 and 6 of the transcript. They were not tenants in common, joint tenants, co-partners, nor joint contractors. They had no *joint* interest of any kind, in any thing whatever.

As lessee Wadley is entitled to the present enjoyment of certain rights and franchises during the term of his lease; and as lessor the railroad company is entitled in reversion to the same rights and franchises. Wadley has no interest in the *estate* of his lessor, and the railroad company has no interest in the *estate* of its lessee.

"If an injury affects the reversion, both landlord and tenant may have *distinct* actions for the same wrongful act; as, for an injury to trees, the landlord may sue for injury to the body of the tree, and the tenant in respect to its shade or fruit."

Taylor, Landlord and Tenant, § 200.

It may be that the railroad company and Wadley's executor were improperly joined as complainants, because their interests were separate and distinct; but this error was one of form, and was waived, by not being assigned as one of the grounds of demurrer.

5 *How.* (132), *Nelson vs. Hill.*
3 *How.* (412), *Oliver vs. Piatt.*
123 *U. S.*, 751, *Hefner vs. Ins. Co.*

I think it clear that Wadley's executor could have filed one bill to protect his rights as lessee; and that the railroad company could have filed another bill to protect its rights as lessor.

The litigation in this case, was, in *fact*, a joinder of two such bills in one suit. The litigation, though one in *form*, was in *fact* two suits, "the one being interjected in the other"—viz.:

(1) Georgia Railroad and Banking Company vs. The Railroad Commissioners, and

(2) Wadley's Executor vs. The Railroad Commissioners.

In those two suits (consolidated into one), "the parties complainant were different, the titles were different, and the interests were different;" the case therefore falls under paragraph (*c*) above.

Though the decree was rendered against both the Railroad Company and Wadley's executor, I think it should be construed as a decree against the company, "*for the title asserted by it;*" and as a decree against Wadley's executor, "*for the title asserted by him;*" and therefore the case is also covered by paragraph (*d*), above.

SEC. 10. Our opponents may argue that Wadley's executor is at least "indirectly interested" in that part of the decree which adjudges the question at issue against the Railroad Company, because he stands in privity with the company, and is therefore bound by the decree against it. But upon reflection it will be seen, that if I am right in the position that the litigation was in *fact* two suits, for two distinct titles and interests, Wadley's executor, as the owner of one of those titles or interests, *occupies no relation of privity whatever to the other title or interest.*

Besides, I think the cases referred to in paragraphs (*f*) and (*g*), above, show that mere *privity* is not enough to give a party such an interest in a judgment or decree, as will prevent a co-party from appealing, or prosecuting a writ of error, without him. Privity denotes interest *by succession*, whereas the interest referred to in the cases cited, is a *joint* and *contemporaneous* interest.

I submit, therefore, with confidence, that the Georgia Railroad and Banking Company had a perfect right to sue out the writ of error, notwithstanding Wadley's executor refused, or failed, to join in it; and that it was not necessary for said company to "summon him and sever;" or to "notify him in writing," as seems to be the modern practice.

14 *Wall.*, 404, *O'Dowd vs. Russell.*
10 *Wall.*, 418, *Masterson vs. Herndon.*
16 *Pet.*, 523, *Todd vs. Daniels.*

ED. BAXTER,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAMES H. McKENNEY,
CLERK.

IN SUPREME COURT OF UNITED STATES.

THE GEORGIA RAILROAD AND BANKING COMPANY,

PLAINTIFF IN ERROR,

versus

JAMES M. SMITH, CAMPBELL WALLACE AND LEANDER N. TRAMMELL,

RAILROAD COMMISSIONERS OF GEORGIA,

AND

CLIFFORD ANDERSON,

ATTORNEY-GENERAL OF GEORGIA

DEFENDANTS IN ERROR.

BRIEF OF JOS. B. CUMMING,

FOR PLAINTIFF IN ERROR,

IN REPLY TO MOTION TO DISMISS.

IN SUPREME COURT OF UNITED STATES.

THE GEORGIA RAILROAD AND BANKING COMPANY,

PLAINTIFF IN ERROR,

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DEFENDANTS IN ERROR.

BRIEF OF JOS. B. CUMMING,

FOR PLAINTIFF IN ERROR,

IN REPLY TO MOTION TO DISMISS.

I.

The first ground of the motion is as follows:—

"1st. Because it appears by the record in said case that the said plaintiff in error, The Georgia Railroad and Banking Company, has no interest in the subject matter of said suit, the said plaintiff in error having, before the bill was filed praying an injunction against the said defendants in error, leased and farmed out and assigned all its rights of every kind in and to the use of the railroad of said plaintiff in error, and to the transportation and conveyance of passengers, produce and merchandise thereon, to William M. Wadley for the period of ninety-nine years from the first day of April, A. D., 1881, as appears from a copy of said lease, appended as an exhibit to said bill, commencing on page 8 of the printed transcript of the record."

1. The Plaintiff in Error has very substantial interest in the subject matter of the suit.

The suit is one undertaken on its part for the protection of one of its most valuable franchises.

The protection of corporate franchises furnishes frequent instances, where the interference of courts of equity to grant injunctions is freely exercised.

High on Injunction, Sections 575, 578.
Osborn *vs.* U. S. Bank, 9 Wheaton 738, 841.

As reversioner, to whom the use of the franchise is to return upon the termination of the lease for any cause, Plaintiff in Error has an interest sufficient to sustain its suit.

Taylor, Landlord and Tenant, Section 200.

2. If it be said that protection of the franchise is not called for at present, but can await the termination of the lease, I would reply:

Plaintiff in Error has a substantial present interest in securing the enjoyment of this important franchise to its lessee. It is a fair and practical presumption that the ability of the lessee to pay the rent is seriously affected by the inhibition upon him to charge the charter tariffs for freight and passengers.

3. But apart from any legal considerations affecting any other suitor than a railroad corporation, the Plaintiff in Error has this momentous interest in the suit, that *it* is liable to respond for any violations by its lessee of the statute against which the injunction is sought.

This position is stated in the bill thus: "Notwithstanding said deed of lease, your orator, The Georgia Railroad and Banking Company, remains liable to the public" (meaning thereby the State) "and to third parties, whose persons and property are transported over the leased railroads, for any breach of duty in and about the management and operation of said railroads, and might incur, as well as your orator, William O. Wadley, executor, the penalties hereinafter mentioned."

This extract from the bill states an unquestionably correct legal proposition.

For an examination of so much of the Charter of Plaintiff in Error as relates to its power to lease its right of transportation of freight and passengers shows that it is not granted exemption from liability and responsibility as a railroad company, which liability and responsibility remain undiminished notwithstanding the lease.

Exemption from these could be claimed only by virtue of special statute authority.

Pierce on Railroads, page 283.
1 Redfield on Railways (5th Edition) page 618.
Railroad Co. *vs.* Barrow, 5 Wall. 104.
Railroad Co *vs.* Brown, 17 Wall. 445.

That this is the law in Georgia see:—

Singleton *vs.* R. R. Co., 70 Ga. 464.

As a matter of fact, of the five hundred and upward suits, which have grown out of the ordinary operations of the leased railroads since the lease, *not one* has been brought against the lessee, but *all* against the lessor—The Georgia Railroad and Banking Company, the Plaintiff in Error.

Now, in view of the exceptionally heavy penalties, which a railroad company incurs to the State by violations of the Rules of the Commission; in view of the suits which can be brought against it by individuals for such violations; in view of the principles of law which make the lessor equally with the lessee subject to such prosecutions and such suits; and in view of the fact that suitors do actually pass around the lessee and strike at the rich lessor corporation, which stands behind him—in view of these things, how clear it is that the real "interest in the subject matter of said suit" is in the Plaintiff in Error, The Georgia Railroad and Banking Company!

4. The utmost that can be affirmed as to the non-existence of interest on the part of Plaintiff in Error is that its interest is suspended during the continuance of the lease. I have endeavored to show that even this view is not correct.

But even if it were correct, can Plaintiff in Error safely postpone the assertion of its rights until the lease terminates by limitation, or on the happening of one of the contingencies, which, by the provisions of the deed of lease, put an end to it?

Such postponement would be acquiescence on the part of Plaintiff in Error, fatal to its rights.

Laches. delay in prosecuting one's right, will be assumed to be acquiescence in the assertion of adverse rights.

Story's Com. on Equity, pages 735, 737.

"It is requisite that a complainant, seeking the aid of a Court of Equity by injunction, shall not have been guilty of laches or delay in the assertion of his rights; for while such delay may not amount to proof of acquiescence in the wrong for which he seeks redress, it may yet suffice to prevent his obtaining relief by injunction."

High on Injunction, Section 7.

"In all cases of the exercise of the strong arm of equity by injunction. the right to the relief may be lost by one's own negligence and delay in seeking protection." *Ibid.* 397.

The relief even against a void assessment of taxes is lost by acquiescence. *Ibid.* 364.

"He who seeks the aid of equity to enjoin the violation of an agreement, or for the protection of his contract rights, * * * must show that he has used reasonable diligence in asserting his rights and demanding their protection, and unreasonable delay in seeking the aid of a Court of Equity, or acquiescense in the violation of the agreement in question, will generally prove a bar to the exercise of the jurisdiction." *Ibid.* 707.

"As in all cases where the preventive jurisdiction of equity is invoked for the protection of rights, he who seeks relief against a violation of his franchise must make his application promptly and without delay, and must use reasonable diligence in the assertion of his rights." *Ibid.* 575.

See also Twin Lick Co. *vs.* Marbury, 91 U. S. 587.
Bowman, *et. al.*, *vs.* Wathen, *et. al.*, 1 How. 189.

II.

The second ground of the motion is as follows:—

"2d. Because the bill filed in said cause was filed in behalf of said Plaintiff in Error and of William O. Wadley, as executor of the said William M. Wadley, deceased, setting forth the lease for ninety-nine years from the said 1st day of April, 1881, of the said railroad and its franchises and appurtenances, and of all the rights and privileges of the said Plaintiff in Error in and to the use of said railroad in the transportation and conveyance of persons, produce and merchandise on and over the same for the period aforesaid, and to charge and collect fares for the transportation of passengers and merchandise over said road; and the said William O. Wadley, as such executor, was a party complainant to said bill, and the only party complainant interested in the rates of fare to be charged for the transportation of persons, produce and merchandise over said railroad when the decision complained of by the said Plaintiff in Error was made by the Supreme Court of Georgia. Nevertheless, the said William O. Wadley, as executor as aforesaid, did not join in the application for said writ of error, and is not a party to said cause in this Court, although as the executor of said deceased lessee, he, the said William O. Wadley, is the only person interested in the rates of fare to be charged for the transportation and conveyance of passengers, produce and merchandise on and over said railroad."

This in effect is merely an objection on account of the nonjoinder of the lessee in the writ of error, and of the failure either to "summon and sever," or to notify the other complainant in writing.

1. I answer that the judgment rendered in this case is severable in fact and in law. The judgment is joint only in form. It is in effect a judgment against the lessee for the title asserted by him, and a judgment against the lessor for the title asserted by i .

While there was in form but one litigation there were in fact two suits.

One suit was interjected into another.

Either complainant might have filed his bill separately for relief as to his or its own title and interest.

The two complainants who joined in the bill were not tenants in common, joint tenants, copartners or joint contractors. They had no *joint* interest of any kind whatsoever.

Indeed, it is probably true that the bill, as exhibited, was demurrable by reason of the improper joinder in it of both complainants—an error, however, which, if it existed, was waived by failure to assign it as one of the grounds of demurrer.

I cite in support of these views:

Hanrick *vs.* Patrick, 119 U. S. 163.
Forgay *vs.* Conrad, 6 How. 203.
Todd *vs.* Daniel, 16 Peters 523.
Germain *vs.* Mason, 12 Wall. 261.
Railroad *vs.* Johnson, 15 Wall. 8.
Taylor on Landlord and Tenant, Section 200.

2. If it should be said that there is privity between the complainants, I reply that such privity alone will not support the motion. To sustain the motion the interest should be joiut and contemporaneous.

Todd *vs.* Daniel, 16 Peters, 523.
Germain *vs.* Mason, 12 Wall. 261.
Railroad *vs.* Johnson, 15 Wall. 8.

The latest utterance of the court on this question, in Hanrick *vs.* Patrick, through Mr. Justice Matthews, lays down the rule more liberally than any previous decision, showing what is the drift of the court on this question.

JOS. B. CUMMING,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
APR 25 1888
JAMES H. McKENNEY.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

THE GEORGIA RAILROAD & BANKING COMPANY,

PLAINTIFF IN ERROR.

VS.

JAMES M. SMITH, CAMPBELL WALLACE AND

L. N. TRAMMELL, RAILROAD COMMISSIONERS,

ET AL., DEFENDANTS IN ERROR.

IN ERROR FROM THE SUPREME COURT OF GEORGIA.

BRIEF OF

CLIFFORD ANDERSON,

COUNSEL FOR DEFENDANTS IN ERROR.

MACON, GEORGIA:
J. W. BURKE & CO., PRINTERS, PUBLISHERS AND BINDERS.
1888.

THE GEORGIA RAILROAD AND BANKING COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES M. SMITH, CAMPBELL WALLACE AND L. N. TRAMMELL, RAILROAD COMMISSIONERS, *et al.*,
DEFENDANTS IN ERROR.

In the Supreme Court of the United States. In Error to the Supreme Court of Georgia.

Brief of CLIFFORD ANDERSON, Counsel for Defendants in Error.

The plaintiff in error claims the exclusive right of fixing and regulating its own rates for the transportation of passengers over its road, so long as it does not exceed the charges specified in the 12th Section of its Charter.

The Supreme Court of Georgia held otherwise. It further held that the rates to be charged on said road were subject to regulation under and by virtue of the Act of the Legislature of Georgia, approved October 14th, 1879. Of this decision, plaintiff in error complains.

Article 4, Section 2 paragragh 1, of the Constitution of the State of Georgia (See Section 5094 of the Revised Code) provides that:

"The power and authority of regulating Railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various Railroads of this State, and to prohibit said Roads from charging other than just and reasonable rates, and enforce the same by adequate penalties."

In pursuance of this provision of the State Constitution, the Legislature passed the Act approved October 14th, 1879, requiring the appointment of three Railroad Commissioners. The 5th and 6th

Sections of that Act, which define and set forth the powers and duties of the Commissioners, are embodied in Sections 719 (e) and 719 (f) of the Revised Code, and are as follows:

DUTY OF COMMISSIONERS.—The Commissioners appointed as hereinbefore provided shall, as provided in the next Section, make reasonable and just rates of freight and passenger tariffs, to be observed by all Railroad Companies doing business in this State on the Railroads thereof; shall make reasonable and just rules and regulations, to be observed by all Railroad Companies doing business in this State, as to charges at any and all points for the necessary handling and delivering of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the Railroads in this State; shall make reasonable and just rates of charges for use of Railroad cars carrying any and all kinds of freight and passengers on said Railroads, no matter by whom owned or carried; and shall make just and reasonable rules and regulations, to be observed by said Railroad Companies on said Railroads, to prevent the giving and paying of any rebate or *bonus*, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers: *Provided*, that nothing in this Article contained shall be taken as in any manner abridging or controlling the rates for freight charged by any Railroad Company in this State for carrying freight which comes from or goes beyond the boundaries of the State, and on which freight less than local rates on any Railroad carrying the same are charged by such Railroad, but said Railroad Companies shall possess the same power and right to charge such rates for carrying such freights as they possessed before the 14th of October, 1879, and said Commissioners shall have full power by rules and regulations to designate and fix the difference in rates of freight and passenger transportation to be allowed for longer and shorter distances on the same or different Railroads, and to ascertain what shall be the limits of longer and shorter distances.

COMMISSIONERS SHALL MAKE SCHEDULE OF RATES.—The said Railroad Commissioners are hereby authorized and required to make for each of the Railroad corporations doing business in this State, as soon as practicable, a schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said Railroads; and said schedule shall, in suits brought against any such Railroad corporations wherein is involved the charges of

any such Railroad corporation for transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all Courts of this State as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the Railroads; and said Commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules. When any schedule shall have been made or revised, as aforesaid, it shall be the duty of said Commissioners to cause publication thereof to be made for four successive weeks in some public newspaper published in the cities of Atlanta, Augusta, Albany, Savannah, Macon, Rome and Columbus in this State; and after the same shall be so published, it shall be the duty of all such Railroad Companies to post at all their respective stations, in a conspicuous place, a copy of said schedule for the protection of the people: *Provided*, that the schedules thus prepared shall not be taken as evidence, as herein provided, until schedules shall have been prepared and published as aforesaid, for all the Railroad Companies now organized under the laws of this State, or that may be organized at the time of said publication. All such schedules purporting to be printed or published as aforesaid, shall be received and held in all such suits as *prima facie* the schedules of said Commissioners, without further proof than the production of the schedules desired to be used as evidence, with a certificate of the Railroad Commission that the same is a true copy of the schedule prepared by them for the Railroad Company or corporation therein named, and that the same has been duly published as required by law, stating the name of the paper in which the same was published, together with the date and place of said publication.

The plaintiff in error claims that by the 12th Section of its Charter, granted by the Legislature in 1833, it has the right to fix its own rates of transportation, within the limits prescribed by said Section, and that the Act of October 14th, 1879, is inoperative and void so far as its road is concerned. Its contention is that said Section creates a contract between it and the State, by which the latter has parted with its power to regulate the charges of the former so long as they are not in excess of the rates specified in said Section.

The Section referred to is fully set forth on page 22 of the printed brief of the counsel for the plaintiff in error. The clause relied on is as follows:

"The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchan-

dise and produce over the Railroad or Railroads to be by them constructed, while they see fit to exercise the exclusive right: *Provided*, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles; and five cents per mile for every passenger."

Did the Legislature intend, by this clause in the Charter, to guarantee to the Railroad Company the right, for all time, to charge what it pleases provided the rates specified are not exceeded?

It will be observed that the words used are not words of covenant or contract. But it is said that the first proviso in the 12th Section is the only clause in the Charter which confers the right to charge any tolls or rates for transportation at all. Is this so? Does not the grant by the State of the exclusive privilege of constructing railroads within the prescribed territory (See Sec. 2 on p. 18 of brief Counsel for Plaintiff in error), and of the right to acquire all necessary property and use all necessary means and appliances to successfully operate such railroads (See Sec. 10 on p. 21 of said brief) confer by necessary implication, the right to charge reasonable rates for the carriage of freight and passengers? Having granted the right to construct and own a railroad, did not the Legislature thereby grant the right to charge and collect a reasonable compensation for the use of the property thus owned?

In the case of the State Freight Tax in 15th Wallace, Mr. Justice Strong, delivering the opinion of the Court, says on pp. 277–8:

"We concede * * * * the right of the owners of artificial highways, whether such owners be the State or grantees of franchises from the State, to exact what they please for the use of their ways. That right is an attribute of ownership." See also the Chicago, etc. R. R. Co. vs. Iowa, 94 U. S. 155.

But suppose it were conceded that the proviso in question prescribes by implication the maximum rates to be charged by the plaintiff in error, how would it follow that the Legislature has contracted that these maximum rates shall never be changed? It is conceded, and this is the extent of the concession, that so long as the plaintiff in error claimed and enjoyed the exclusive privileges granted to it by the 12th Section of its Charter, its charges could not exceed those specified in the proviso. Such was, in substance, the ruling in the case of Arnold & DuBose, vs. the Georgia R. R. Co., 50 Ga. 304. When the suit, in that case, was brought, the Company was in the

enjoyment of the exclusive privilege granted by the 12th Section of its Charter. The opinion of the Court, however, in that case is mere *obiter*, the Court below having decided that it had no jurisdiction of the suit, and no other question being properly before the reviewing Court. But the Company having enjoyed the exclusive privileges conferred, was certainly bound to conform to the conditions on which the monopoly was granted.

Analyzing the clause of the Charter under discussion, it first grants to the plaintiff in error, the exclusive privilege of transporting persons, merchandise and produce, over the railroads to be constructed for a period limited—by the 15th Section of the Charter—to thirty-six years, from the completion of the road from Augusta to either of the points thereinbefore designated, and then, by proviso, forbids that the charges for thus transporting persons, merchandise and produce, shall exceed certain specified rates. In other words, the State says to the Company, I grant you for the period of thirty-six years, from the completon of your road, a monopoly of the business of transporting passengers and freight over the lines of railway to be constructed, but I couple with the grant the condition that your charges shall not exceed certain prescribed rates. You can exercise this exclusive privilege so long as you "see fit," not to exceed the period designated, provided you comply with the terms specified.

Out of this plain conditional grant by the State, for a limited period of time, it is sought to evolve a contract giving the Company the perpetual and unconditional right to charge whatever rates it pleases if they do not exceed those specified. A conditional grant for a limited time is to be made an unconditional grant in perpetuity! Such a construction would do violence to rules of interpretation, which, in the language of Mr. Justice Swayne, (in Fertilizer Company vs. Hyde Park, 97 U. S., 659,) have become "axiomatic in the jurisprudence of this Court."

The case of Railroad Commission of Mississippi vs. Yazoo & Mississippi Valley Railroad Co., (21 Amer. and En. Railroad cases, page 6,) was a case where the charter of the Company conferred on it the "power to fix, from time to time, by its Board of Directors, the rates at which it will transport persons or property over its railroad, provided they shall not exceed a maximum sum specified in the Act."

I quote from the brief of counsel for the plaintiff in error—page 16. How different the grant in that case from the one in this.

There the contract was that the Company, by its Board of Directors, should have the power, from time to time, to fix its rates, provided a certain prescribed maximum was not exceeded. Where is any such power given in this case? There, the State, in express terms, contracted that the Company might, for all time, fix its own rates not to exceed a maximum named. Here the contract is not as to the right to fix rates, but the State contracts that the Company shall enjoy the exclusive privilege of using its road in the transportation of passengers and freight on certain conditions.

There is no contract giving the Company the power of fixing its own rates, nor prohibiting the State from, at any time, exercising its admitted common law right of regulating those rates.

The State simply says to the Company—I will not, for the present, exercise the power to regulate your rates, nor make any contract with you on the subject; no exigency exists requiring me to interfere, and I leave the charter silent as to the regulation of rates, parting with no power on the subject, but I give you the exclusive privilege of using your road in conveying passengers and merchandise so long as you do not seek to make the public pay more than certain rates; this privilege, however, to terminate within thirty-six years from the completion of your road from Augusta to either of the points designated.

Had the Supreme Court of Mississippi been dealing with such a grant it could not have held that the State had parted, by contract, with its power to regulate the rates of the Company; for (quoting again from the brief of counsel for plaintiff in error, on page 18,) that Court fully recognizes the doctrine for which I contend, in using the following language: "It is not to be presumed that the right of Legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the Legislature an intent to part with any power, it will be done. Only what is plainly parted with is gone."

Case after case might be cited where this Court has announced the same doctrine. Indeed there is an unbroken current of authority, both in this country and in England, in support of it. For example, in the case of Charles Barrett vs. the Stockton & Darlington Railway Co., 40th En. Com. L. Repts, p. 298, it is held that—

"Where the language of an Act of Parliament, obtained by a Company, for imposing a rate or toll upon the public, is ambiguous,

or will admit of different meanings, that construction is to be adopted which is most favorable to the public."

To the same effect is 42d En. Com. L. Repts, 496. See also 46th do., 234, p. 5.

Before the State's right to interfere can be denied, there must be a plain and unambiguous contract showing that the State has "permanently" fixed the maximum and has conferred on the Company the sole power within these limits, of prescribing its own rates. See Chicago, etc. R. R. Co. vs. Iowa, 94 U. S., 155; Ruggles vs. Iowa, 108, U. S. 526; Railroad Commission cases, 116, U. S., 307, 347.

Counsel for plaintiff in error cites instances to show that provisos are not always attached for the purpose of imposing conditions. This is admitted, but it is undeniable that the office of a proviso is ordinarily to attach a condition or limitation. See authorities cited in opinion of the Supreme Court of Georgia in this case, page 41 of brief of Counsel for Plaintiff in error.

It is incumbent on plaintiff in error in this case to show that the proviso under consideration does not impose a condition to the grant to which it is appended, but is a distinct and affirmative contract uncoupled and unconnected with that which immediately precedes it.

By what right does the plaintiff in error put asunder what the Legislature has joined together? By what rule of construction can the qualifying clause of a grant be substituted for the grant itself?

Counsel for plaintiff in error contends that too much significance is attached to the phrase "exclusive privilege," and yet he is obliged to admit that the charter itself attaches so much importance to the monopoly granted to the Company, in the use of its road, that it is very careful to provide adequate penalties to protect it in the enjoyment of that monopoly. See the 13th, 14th and 15th sections of the charter particularly. If counsel for plaintiff in error is correct in his exposition of the 12th section, what do the following words, in the 15th section, mean:

"And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other railroads, for the trade and intercourse contemplated herein: Nevertheless the Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own work herein granted and secured, except the exclusive right to make, keep up and use railroads over and through such parts of the country that

shall so have expired by the foregoing limitations; but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by the said incorporated Company."

From this clause it would seem that the Legislature attached very considerable importance to the "exclusive privilege" granted by the 12th Section, and that it did not intend to "*renew and extend that exclusive right*" except *upon prescribed terms* and *conditions*, as had been done in the first instance. Is not this clause in the 15th Section a clear Legislative interpretation of the meaning and purpose of the first proviso in the 12th Section, viz: that it prescribed the *terms* and conditions on which the *exclusive* privilege granted in the latter section was conferred?

It seems to me that no other view can be taken of it, and that the Legislature, in the 15th Section of the Company's charter, has made plain the meaning of the first proviso in the 12th Section.

If the meaning was doubtful it would be fatal to the claim of the plaintiff in error, but the 15th Section removes all doubt, and demonstrates that the construction contended for by the Company is wholly untenable.

CLIFFORD ANDERSON,
Counsel for Defendants in Error.

The Georgia Railroad & Banking Company

vs.

James M. Smith et al., Railroad Commissioners of Georgia.

In Error to the Supreme Court of Georgia, in the Supreme Court of the United States.

Brief of Clifford Anderson in support of motion to dismiss.

In support of the motion to dismiss the writ of error in the above stated case, I cite the case of Williams vs. Hagood, 98 U. S., p. 72, which rules, in substance, that where a bill shows no equity in the complainant, and contains no averment that he has been injured by certain statutes of a State, this Court will not pass on an abstract question the object of which is to obtain a decision touching their Constitutionality.

It is claimed that the principle ruled in that case applies to the motion to dismiss this.

CLIFFORD ANDERSON,

Counsel for Movant.

IN THE

Supreme Court of the United States.

THE GEORGIA RAILROAD AND BANKING COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES M. SMITH, CAMPBELL WALLACE, AND LEANDER N. TRAMMELL, RAILROAD COMMISSIONERS OF GEORGIA, AND CLIFTON ANDERSON, ATTORNEY GENERAL OF GEORGIA, DEFENDANTS IN ERROR.

In Error to the Supreme Court of Georgia.

MOTION TO DISMISS.

And now come the defendants in error, by their counsel, and move the court to dismiss the above-stated case and the writ of error therein for the following reasons:

1st. Because it appears by the record in said case that the said plaintiff in error, The Georgia Railroad and Banking Company, has no interest in the subject-matter of said suit, the said plaintiff in error having, before the bill was filed

praying an injunction against the said defendants in error, leased and farmed out and assigned all its rights of every kind in and to the use of the railroad of said plaintiff in error, and to the transportation and conveyance of passengers, produce, and merchandise thereon, to William M. Wadley for the period of ninety-nine years from the first day of April, A. D. 1881, as appears from a copy of said lease, appended as an exhibit to said bill, commencing on page 8 of the printed transcript of the record.

2d. Because the bill filed in said cause was filed in behalf of said plaintiff in error and of William O. Wadley, as executor of the said William M. Wadley, deceased, setting forth the lease for ninety-nine years from the said 1st day of April, 1881, of the said railroad and its frnchises and appurtenances and of all the rights and privileges of the said plaintiff in error in and to the use of said railroad in the transportation and conveyance of persons, produce, and merchandise on and over the same for the period aforesaid, and to charge and collect fares for the transportation of passengers and merchandise over said road; and the said William O. Wadley, as such executor, was a party complainant to said bill and the only party complainant interested in the rates of fare to be charged for the transportation of persons, produce and merchandise over said railroad when the decision complained of by the said plaintiff in error was made by the supreme court of Georgia. Nevertheless the said William O. Wadley, as executor as aforesaid, did not join in the application for said writ of error and is not a party to said cause in this court, although as the executor of said deceased lessee he, the said William O. Wadley, is the only person

interested in the rates of fare to be charged for the transportation and conveyance of passengers, produce, and merchandise on and over said railroad. (See pages 4 to 8, inclusive, of printed transcript of the record in said case.)

CLIFFORD ANDERSON,
Counsel for Def'ts in Error.

128-182

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

~~No. 298.~~ 39

THE LIGGETT AND MYERS TOBACCO COMPANY, APPELLANT,

vs.

RUDOLPH FINZER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 19, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 298.

THE LIGGETT AND MYERS TOBACCO COMPANY, APPELLANT,

vs.

RUDOLPH FINZER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the district of Kentucky at a regular term of said court begun and held at Louisville on Monday, February 16th, 1885.

Present: Hon. John W. Barr, judge of the United States for the district of Kentucky.

THE LIGGETT & MYERS TOBACCO COMPANY, Complainant,
vs.
RUDOLPH FINZER, Defendant. } In Equity.

Be it remembered that heretofore, to wit, on the 20th day of November, 1883, came the complainant, by Paul Bakewell, its counsel, and filed its bill of complaint against the above-named defendant, which bill is as follows:

Bill of Complaint.

Circuit Court of the United States in and for the District of Kentucky. In Equity.

2 THE LIGGETT & MYERS TOBACCO COMPANY, a Corporation,
vs.
RUDOLPH FINZER.

To the honorable the judges of the circuit court of the United States for said district:

The Liggett & Myers Tobacco Company, a corporation, duly created and existing under and by virtue of the laws of the State of Missouri, and having an office and doing business in the city of St. Louis, in said State, a citizen of the State of Missouri, brings this its bill of complaint against Rudolph Finzer, a citizen of the State of Kentucky, doing business under the name of Rudolph Finzer, in the city of Louisville, in said State of Kentucky.

And thereupon the said Liggett and Myers Tobacco Company, complaining, says:

That for many years past it has been very extensively engaged in the business of manufacturing of plug tobacco in the city of St. Louis aforesaid and vending the same in large quantities throughout the United States and in the city of Louisville aforesaid; that its

3 said plug tobacco now is, and for many years past has been, put up for sale marked with the following mark—that is to say, a star affixed to the plug tobacco manufactured by it.

And your orator further shows unto your honors that by means of the care, skill, and fidelity with which your orator has conducted the manufacture of its plug tobacco it—said plug tobacco—has acquired a great reputation in the trade throughout the United States, and large quantities of the same are constantly required from your orator to supply the regular demand for the consumption of the country.

And your orator further shows unto your honors that its said plug tobacco, by reason of the peculiar distinguishing mark of a star fast-

ened upon it, has become known and distinguished by the trade and public as "Star" plug tobacco, so as to be named and called for by the trade and public in purchasing plug tobacco as "Star" tobacco;

4 and that your orator was the original manufacturer of plug tobacco with the figure or design of a star affixed to the plugs of tobacco, and the first to introduce the same to the public.

And your orator further shows unto your honors that said Rudolph Finzer, well knowing the premises, is now manufacturing and selling at the city of Louisville, in the State of Kentucky, in the district of Kentucky, plug tobacco to which is affixed a mark as follows—that is to say, a mark affixed to the plug tobacco manufactured by said Rudolph Finzer, being a round piece of gilded paper on which there is a red star, and under the star the word "light," which is calculated to mislead the trade and the public and induce the purchase on the part of the trade and the public of this plug tobacco manufactured by said Rudolph Finzer, marked as aforesaid as "Star" tobacco, the name by which your orator's plug tobacco, by reason of the peculiar mark first introduced and adopted by your orator on plug tobacco, has become known to the trade and the public.

5 That thus the rights of your orator in the premises are in danger of interference and your orator in danger of suffering loss to his business in this: That the plug tobacco manufactured by your orator, which, on account of the skill and fidelity with which your orator has conducted the manufacture of it, has found favor and is in great demand and which has become known to the trade and public as "Star" tobacco, is likely to be mistaken for the plug tobacco manufactured and sold and marked as aforesaid by said Rudolph Finzer to the extent of answering a call for "Star" tobacco, and that thus, on the reputation established by your orator for "Star" plug tobacco, the plug tobacco manufactured by said Rudolph Finzer is likely to obtain ready sale to the manifest injury of your orator and contrary to equity and good conscience.

And your orator further says that by reason of the premises it is in danger of suffering great injury to its business in loss of sales and in having an article not manufactured by it placed upon the market and sold as "Star" plug tobacco, a kind of plug tobacco in favor and much sought after on account of the worth attached to it as

6 of the manufacture of your orator.

That your orator has but recently learned of the use by the said Rudolph Finzer of the mark on plug tobacco heretofore described, and which your orator claims by reasons of the premises is an infringement upon the exclusive right of your orator to the mark of a star on plug tobacco; and that your orator has requested and notified said Rudolph Finzer to desist from further use of the mark hereinbefore described as used by him, but that said Rudolph Finzer has refused to discontinue the use of such mark and still continues to use the same on plug tobacco made and sold by him to the threatened injury of your orator in the premises.

In consideration whereof and forasmuch as your orator is remediless in the premises at law and cannot have adequate relief, save

by the aid and interposition of this court as a court of equity, to the end, therefore, that the said Rudolph Finzer, if he can, show why your orator should not have the relief hereby prayed,
7 and may, upon his corporal oath and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the interrogatory hereinafter set forth—that is to say, whether the said Rudolph Finzer, or his agent or agents, or any one for him, had at any time heretofore or is now manufacturing or selling a- *a* Louisville, in the State of Kentucky, or elsewhere, plug tobacco to which is affixed a mark as follows: A mark affixed to plug tobacco manufactured by said Rudolph Finzer, being a round piece of gilded paper on which there is a red star and under the star the word "light;"

And that said Rudolph Finzer may answer the premises, and that the said Rudolph Finzer, his agents and servants, may be perpetually enjoined and restrained from manufacturing, selling, or offering for sale, directly or indirectly, any plug tobacco manufactured by him or any person other than your orator having affixed thereupon the mark of a star or a mark such as is hereinbefore described—
8 that is to say, a mark affixed to a plug of tobacco, being a round piece of gilded paper on which there is a red star and under the star the word "light," or by affixing in any manner to plug tobacco any mark so as to be a colorable imitation of your orator's said mark, commonly known as "Star" plug tobacco; and that said Rudolph Finzer, his agents and servants, may be decreed and ordered to deliver up and destroy, under the direction of an officer of this court, all the marks as hereinbefore described as placed upon plug tobacco manufactured by said Rudolph Finzer, and all plates or stamps used in the manufacture of said marks;

And your orator further prays that it may have its costs and charges in this behalf paid by the said Rudolph Finzer, and that your orator may have such other and further relief in the premises as to your honors shall seem meet and shall be agreeable to equity and good conscience:

May it please your honors to grant unto your orator a writ of injunction issuing out of and under the seal of this court, to be
9 directed to the said Rudolph Finzer, his agents & servants, therein and thereby commanding and perpetually enjoining them, under a certain penalty in the said writ to be expressed, according to the foregoing prayer of your orator.

May it please your honors to grant unto your orator a writ of subpœna, issuing out of and under the seal of this court, to be directed to the said Rudolph Finzer, commanding him, on a certain day and under a certain penalty in said writ to be inserted, personally to be and appear before your honors in this court, then and there to answer the premises, and to stand to and abide by and perform such order and decree therein as to your honors shall seem meet and shall be agreeable to equity and good conscience.

And your orator will ever pray.

PAUL BAKEWELL,
Solicitor for Complainants.

UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

Personally appeared before me John E. Liggett, president
10 of the Liggett and Myers Tobacco Company, a corporation, on this 15th day of November, A. D., 1883, and made oath that the foregoing bill in equity has been read to him, and that, in so far as it states matters within his knowledge, it is true to his knowledge, and so far as it states matters within his belief it is true to his belief.

JOHN E. LIGGETT, *P't.*

Subscribed & sworn to before me this 15th day of November, A. D. 1883.

[SEAL.] W. H. SCUDDER, JR.,
Notary Public, City of Saint Louis, Mo.

Upon which bill of complaint there issued the following subpœna in chancery, to wit:

Subpœna in Ch'y.

The President of the United States of America to Rudolph Finzer, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in January next, to answer a bill in equity exhibited against you in our said court by Liggett & Myers Tobacco Co., which you shall
11 in nowise omit, under the penalty of the law.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of our circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 20th day of Nov'r, A. D. 1883, and in the 108 year of our Independence.

Attest: SAMUEL B. CRAIL,,
C. C. C., K. D.,

[SEAL.] By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendant is to enter his appearance in the suit in the clerk's office on or before the 7th day of January next, the day at which this writ is returnable; otherwise the bill may be taken *pro confesso.*

SAMUEL B. CRAIL, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

Upon which subpœna the marshal made the following return, viz:

Marshal's Return.

Executed this s'p'a in ch'y by delivering a true copy thereof to Rudolph Finzer at his place of business, in the city of Louisville, this 21st day of November, 1883.

A. J. AUXIER, *U. S. M.*,
By J. H. MOODY, *D. M.*

12 And afterwards, to wit, on the 4th day of February, 1884, came the defendant, by Beattie & Winchester, his counsel, and filed his answer herein, which is as follows, to wit:

Answer.

In the Circuit Court of the United States in and for the District of Kentucky. In Equity.

THE LIGGETT & MYERS TOBACCO COMPANY, a Corporation,
vs.
RUDOLPH FINZER. } No. 5777.

The answer of Rudolph Finzer, defendant, to the bill of the complaint of the Liggett & Myers Tobacco Company, a corporation, complainant:

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary
13 for him to make unto, this defendant, answering, saith—

That this defendant admits that for a number of years past, but for precisely how many this defendant does not know, the complainant has been very extensively engaged in the manufacture of plug tobacco in the city of St. Louis, in the State of Missouri, vending the same in large quantities throughout the United States and in the city of Louisville, in the State of Kentucky; that large quantities, but not all, of the plug tobacco so manufactured and sold by the complainant now are and for a number of years past have been put up for sale, marked with a star affixed to it, the particular character and design of which star or mark is hereinafter set forth; that the said plug tobacco of the complainant has acquired from the complainant's care, skill, and fidelity in the manufacture of the same a great reputation in the trade throughout the United States, and that large quantities of the same are constantly required from the complainant to supply the regular demand for the con-
14 sumption of the country, and that complainant's said plug tobacco, by reason of the peculiar distinguishing mark of a star, which is hereinafter particularly and accurately described, fastened upon it, has become known and distinguished by the trade and public as "Star" plug tobacco, so as to be named and called for

by the trade and public in purchasing plug tobacco as "Star" tobacco.

And this defendant, further answering, admits that he, well knowing the premises in the said bill of complaint referred to, except so far as the same are in this answer denied, is now and was at the time of the filing of the said bill of complaint manufacturing and selling at the city of Louisville, in the State of Kentucky, in the district of Kentucky, plug tobacco to which is affixed a mark, being a round piece of gilded paper, on which there is a red star and under the star the word "light," and being the same mark which is hereinafter more fully described.

And this defendant, further answering, says that the com-
15 plainant was not the original manufacturer of plug tobacco with the figure or design of a star affixed to the plugs of tobacco, and was not the first to introduce the same to the public; that said plug tobacco manufactured by this defendant to which is affixed a mark, described in the said bill of complaint as a round piece of gilded paper, on which there is a red star and beneath the star the word "light," but which is more fully hereinafter described, is not calculated to mislead the trade or the public, or to induce the purchase on the part of the trade or the public of this defendant's said plug tobacco as "Star" tobacco; that the right- of complainant in the premises are not in danger of interference, and the complainant is not in danger of suffering loss in its business, in this, that the complainant's said "Star" tobacco is likely to be mistaken for this defendant's said plug tobacco, and that on the reputation established by complainant for "Star" plug tobacco or in any way the plug tobacco manufactured by this defendant is not likely to
16 obtain ready or any sale, to the manifest or other injury of complainant, or contrary to equity or good conscience.

And this defendant, further answering, says that by reason of the premises referred to in the said bill of complaint, or otherwise, the complainant is not in danger of suffering great or any injury in its business in loss of sales or in having an article not manufactured by it placed upon the market or sold as plug tobacco of its manufacture or otherwise.

And this defendant, further answering, says that it is probably true that the complainant had recently before the filing of its said bill of complaint learned of the use by this defendant of his said mark on plug tobacco, but he says that his said use of the same is not an infringement upon the alleged exclusive right of the complainant to the mark of a star on plug tobacco, and that the complainant has not the exclusive right to the mark of any star on plug tobacco, but only such right to the mark of the star now and heretofore used by it on plug tobacco, and to such colorable imitations
17 thereof as are calculated or likely to deceive and mislead the trade and the public into the belief that the plug tobacco produced by others is plug tobacco produced by the complainant.

This defendant admits that the complainant has requested and notified him to desist from the further use of his said mark, and that he declined to discontinue the use of such mark, and that he

still continues to use the same on plug tobacco made and sold by him, but he says that he does not do so to the threatened or other injury of the complainant in the premises or at all.

And this defendant, further answering, says, in answer to the special interrogatory in the said bill of complaint contained, that this defendant has for a short time past manufactured and sold and is now manufacturing and selling at Louisville, in the State of Kentucky, plug tobacco to which is affixed a mark as follows, a mark affixed to plug tobacco manufactured by this defendant, being
18 a round piece of gilded paper, on which there is a red star and under the star the word "light;" but this defendant further says that a more particular and accurate description of the said mark of defendant is hereinafter in this answer set forth.

And this defendant, further answering, says that the said trade mark heretofore and now used by the complainant as the peculiar distinguishing mark of the said plug tobacco manufactured by it is in form a tin star of five points of a little over half an inch in diameter between opposite points, having a round opening or hole in the body of the star, and is affixed to the tobacco by means of tin prongs at the back of the star and sunk into the plug; that such a mark on plug tobacco is widely and commonly known to the trade and the public as a "tin-tag" mark, and that this tin-tag star mark is very generally and extensively, if not universally, known to the trade and the public as the peculiar distinguishing mark of complainant' said "Star" tobacco. This defendant annexes hereto
19 one of the complainant's said tin-tag star marks, and prays that the same may be taken as part of this answer.

And this defendant, further answering, says that his mark in the said bill of complaint mentioned and imperfectly described consists of a round paper label somewhat over three-quarters of an inch in diameter, gilded on the face, with a small five-pointed red star of little more than a quarter of an inch in diameter between opposite points with the word "trade" on one side and the word "mark" on the other side of the star, the said words being in gilt letters on a red ground, and beneath the star, and in bold, prominent letters in red, the word "light," the figure and the word forming in plain, legible characters, not to be mistaken, the word "starlight," and that the said label is affixed to this defendant's said plugs of tobacco by means of paste or mucilage on the back of the label. This defendant annexes hereto one of his said labels, and prays that the same may be taken as part of this answer.

20 And this defendant, further answering, says that his said label is a distinct independent trade mark for plug tobacco of his own manufacture, originated and adopted by him without any reference whatever to the complainant's said mark, and without any thought or intention of interfering with or in any way infringing its rights in respect to the same or of invading or injuring its business connected therewith, but the same has been and is used by him in good faith and for the sole purpose of making and distinguishing plug tobacco of his own production; that this defendant's said mark is not a colorable or other imitation of the com-

plainant's mark; that it has no resemblance thereto, and is plainly and readily distinguishable therefrom, both by sight and by touch; that it cannot be mistaken therefor, and that it is in no way calculated or likely to deceive or mislead the trade or the public into mistaking or purchasing this defendant's said plug tobacco
21 as or for the said "Star" plug tobacco of the complainant.

Without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

RUDOLPH FINZER.

BEATTIE & WINCHESTER,
Solicitors & Counsel for Defendants.

UNITED STATES OF AMERICA, *District of Kentucky,* } *ss:*

Personally appeared before me on this fourth day of February,
22 A. D. 1884, the defendant, Rudolph Finzer, and made oath that the foregoing answer subscribed by him has been read to him, and that, in so far as it states matters within his knowledge, it is true to his knowledge, and so far as it states matters on information or belief it is true to his best relief.

RUDOLPH FINZER.

Subscribed and sworn to before me by Rudolph Finzer this fourth day of February, A. D. 1884, at Louisville, Kentucky.

JAMES A. BEATTIE,
Commissioner of the Circuit Court of the United States for the District of Kentucky.

Marks referred to in and annexed to the foregoing answer, to wit:

Complainant's Mark.



Defendant's Mark.



And afterwards, to wit, on the 12th day of February, 1884, came the complainant, by its said counsel, and filed its replication to the answer herein, which is as follows, to wit:

23 *Replication.*

Circuit Court of the United States in and for the District of Kentucky. In Equity.

THE LIGGETT & MYERS TOBACCO COMPANY, a Corporation,
vs.
RUDOLPH FINZER. } No. 5777.

The replication of the above-named complainants to the answer of the above-named defendant:

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto says:

That it will aver, maintain, and prove its bill of complaint to be true, certain, and sufficient in law to be answered unto; that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in said answer contained, material,
24 or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver and maintain and prove as this honorable court shall direct; and prays as in and by said bill it has already prayed.

PAUL BAKEWELL,
Solicitor for Complainant.

Order on Motion to Strike Out.

And on a day of said February term, to wit, on Tuesday, June 2nd, 1885, came the complainant, by Paul Bakewell, Esq., its counsel; came also the defendant, by James A. Beattie, Esq., his counsel.

The exceptions of complainant to defendant's testimony coming on to be heard it is ordered, adjudged, and decreed as follows:

That as to that part of defendant's testimony designated in complainant's exceptions or motion to strike out as "A" complainant's exceptions are overruled—that is to say, as to all the testimony of witness Holbrook, pp. 8, 9, & 10, D. R., from Q. 3, D. R., p. 8, to ans. 19, D. R., p. 10; all the testimony of witness
25 Wirgman on pp. 11, 12, and 13, D. R.; all the testimony of witness Preston on pp. 13, 14, 15, & 16, D. R.; the testimony of witness Wirgman, recalled, pp. 16 & 17 D. R.; the testimony of Charles C. Voght, Q. and ans. 8, p. 26, D. R., and from Q. 10, D. R., p. 26, to ans. 28, D. R., p. 28, inclusive, and cross-examination of Voght from X Q. 60, D. R., p. 31, to and including X ans. 69, D. R. 32; the testimony of Senior between Q. 3 and Q. 14, exclusive, D. R., pp. 34 & 35; testimony of John Finzer, p. 42, D. R., from Q. 17, D. R., p. 42, to and including ans. 21, D. R. 43; his testimony, D. R., p. 43, from Q. 23 to ans. 25, inclusive, and his cross-exam-

ination from X Q. 52, D. R., p. 46, to and including X ans. 99, D. R., 52, and his redirect examination, Q. 116, D. R., p. 53, to and including ans, 121, D. R. 54; the testimony of Rudolph Finzer from Q. 15, D. R. 55, to and including ans. 27, D. R. 56 and 57, and his testimony from Q. 52, D. R. 59, to and including answer 53, D. R., pp. 59 and 60, and his testimony from Q. 62, D. R. 61, to and including ans. 69, D. R., p. 62, and same witness from X Q. 79, D. R. 63, to and including X ans. 84, D. R. 63, and from
26 X Q. 92, D. R., p. 64, to and including X ans. 97, D. R., p. 65, and from X Q. 101 D. R. 65, to and including X ans. 104, D. R. 65, and from X Q. 117, D. R. 67, to and including X ans. 123, and from Q. 137, D. R. 69, to and including X ans. 143, D. R. 70.

That as to that part of defendant's testimony designated in complainant's exceptions or motion to strike out as "e" complainant's exceptions are overruled—that is to say as to the testimony of Chas. C. Voght from Q. 42, D. R., p. 29, to and including ans. 47, D. R. 30, and his cross-examination from X Q. 76, D. R., to and including X ans. 86, D. R. 34; testimony of John Finzer from ans. 26, D. R. 43, to and including ans. 29, D. R. 44, and from X Q. 100, D. R. 52, to and including ans. 109, D. R. 52, and testimony of Rudolph Finzer from Q. 28, D. R. 57, to and including ans. 29, D. R. 57, and from X Q. 87, D. R. 63, to and including X ans. 89, D. R. 64, except as to X Q. 85, 89, & 90, and the answers thereto so far as they refer to charm mentioned.

That as to that part of defendant's testimony designated in complainant's exceptions or motion to strike out as "f" complain-
27 ant's exceptions are overruled—that is to say, as to all the testimony of David Musselman from Q. 1, D. R., p. 17, to and including ans. 37, D. R., p. 20; all the testimony of H. W. Rudolph, from Q. 1, D. R., p. 20, to and including ans. 16, D. R., p. 22, and the exhibits offered in connection with said witness'*es* testimony; and question and answer of John Finzer, D. R. 43, Q. and ans. 22; and of same witness, D. R., p. 44, from Q. 30 to and including ans. 35; and the testimony of Rudolph Finzer from Q. 124, D. R., 68, to and including ans. 132, same page.

That as to that part of defendant's testimony designated in complainant's exceptions or motion to strike out as "*i*" complainant's exceptions are overruled—that is to say, as to all the testimony of witness Starr from Q. 1, D. R., 22, to and including ans. 8, D. R. 23; of John Miller from Q. 1, D. R., 24, to and including ans. 7, D. R., 25; of Rudolph Finzer from Q. 70, D. R., 62, to ans. 72, same page.

To which action of the court in overruling said exception to said testimony complainant excepted.

Came again the defendant, by his said counsel, and ten-
28 dered his bill of exceptions herein, which is signed and sealed by the court and ordered to be recorded, & which is as follows:

"Be it remembered that on the hearing of the above-entitled cause the court, on motion of the complainant, struck out and excluded from the record herein and refused to allow the defendant to read and refused to hear as evidence in the said cause the following portions of the following depositions taken on behalf of the defendant

and on file in the said cause, and which the defendant offered to read as evidence on his part on the said hearing, to wit:

The part of the deposition of Lewis N. Senior contained in from the 16th question to 51st question therein, both inclusive, and the answers thereto, which questions and answers are as follows, to wit:

16 Q. What did they claim in that controversy?

A. They claimed that they had used the star shape before we had—that is, as a tag on the plug.

17 Q. Did they object to your use of these brands on the outside of the box?

A. No, sir.

29 18 Q. What did they first call their tobacco that is marked with a star?

A. I don't know what they first called it, but at the time that we were using the brand they called it "New Style," branded on each box.

19 Q. Do you know their bills? Have you seen any of their bills?

A. I suppose that I have.

20 Q. Examine the bills now shown you, and state whether or not you recognize those as their bills.

A. Yes, sir; they are their bills; they run into 1878. After they called it the "New Style," I think, they called it "Silver Star" for awhile.

21 Q. In that controversy I understand that they did not claim that they had the right to prohibit you from the use of this brand on the boxes?

A. No, sir.

22 Q. What did they claim?

A. They claimed that they had a right of the star shape; it didn't make any difference whether in tin or on paper.

23 Q. That they had the right to the star shape on what?

A. As a tag on plug tobacco.

30 24 Q. Were you at that time putting star-shaped tags on your tobacco?

A. Yes, sir.

25 Q. Have you any of those tags with you?

A. Yes, sir.

26 Q. Look at the red and blue stars which I show you now, and state what they represent.

A. They are paper tags intended to go on plug tobacco.

27 Q. Are these some of your tags that you used on each plug of your tobacco?

A. Yes, sir.

28 Q. As I understand you, Liggett & Myers objected to your using those sort of tags—that shape?

A. Yes, sir. 29 *Q.* We compromised with them on the terms that they would pay the expense of the dies for cutting the tags and we were to have the privilege of using any other shaped tags that we saw proper or the word star on the tag.

30 Q. Have you any of those plugs with you on which you used the new tags?

A. Yes, sir.

31 Q. Did you name your tobacco from the color of these stars, "Red Star" and "Blue Star?"

A. Yes, sir.

32 Q. I now show you a plug of tobacco with a tin tag on it and a figure that looks like a five-leaf clover, marked "Red Star," and ask you what tobacco that is.

A. That is what we brand as our "Red Star" tobacco at present.

33 Q. That is the mark that you agreed with Liggett & Myers to use in the place of the star-shaped tag?

A. Yes, sir.

34 Q. Do you use the same tag for your Blue Star tobacco?

A. No, sir; not a tin tag.

35 Q. Do you still make the Blue Star tobacco?

A. No, sir; we have not made any of it for some time.

36 Q. State whether or not it was agreed, as a part of this compromise, that you could continue the use of the brand such as you have shown on the caddies and boxes.

A. Yes, sir.

37 Q. Did they claim that they had used that brand prior to you?

A. No, sir.

38 Q. What did they say?

A. Mr. Myers admitted that they had not.

39 Q. Did Mr. Myers represent the complainant, The Liggett & Myers Tobacco Company, in that negotiation with you?

A. Yes, sir.

Cross-examination by Mr. BAKEWELL:

40 Cross-Q. When did you commence marking your plugs of tobacco with a red and blue star, as shown in the defendant's exhibits on this sheet of paper?

A. As early as 1878.

41 Cross-Q. You commenced marking them with those stars in 1878?

A. Yes, sir.

42 Cross-Q. Did the Liggett & Myers Tobacco Company bring any suit against you?

A. No, sir.

43 Cross-Q. They notified you to stop using the star, didn't they?

A. No, sir; I don't know that they notified us.

44 Cross-Q. You had some discussion with them about it?

A. Yes, sir; Mr. Myers came to our place himself and we agreed on that.

45 Cross-Q. How long after you had been using this star did he come?

A. I don't remember.

46 Cross-Q. Can you come at all near it?

A. It was more than a year afterward, I think.

47 Cross-Q. Mr. Myers called to see you, and the result of that discussion was that you stopped using it; you discarded the use of the red and blue star or any other star on your plug tobacco, and you commenced from that time the use of a mark like "Defendant's Exhibit, Senior Plug?"

A. Yes, sir.

48 Cross-Q. You commenced using the star brand, which is shown in the stencils in evidence before you, about 1878, did you?

A. Yes, sir.

49 Cross-Q. When did you discontinue the use of those star brands?

A. I have not discontinued them at all.

50 Cross-Q. You are still using the star brands, are you?

A. Yes, sir.

34 51 Q. By Mr. BEATTIE: Are you still using this tag that is shown in "Defendant's Exhibit, Senior Plug"—the red star?

A. Yes, sir.

The part of the deposition of Rudolph Finzer, from the 30th question to the 35th questions therein, both inclusive, and the answers thereto, which questions and answers are as follows, to wit:

30 Q. Examine the watch-charm that I now show you, and state to whom it belongs.

A. It belongs to me.

31st Q. When and where did you have it made?

A. The locket was purchased here, and the trade mark was put on it in Wall street, New York.

32 Q. What trade mark is it?

A. The Five Brothers' Star.

33 Q. It is a five-pointed star, and between the points the figure "5" and the letters "Bros.," and on the points the names of John, Ben, Fred, Rudy and Nick?

A. Yes, sir.

34 Q. Examine the wax impression that I now show you and state whether or not it was made by that watch-charm?

A. Yes, sir; that is a *fac-simile* of the charm.

35 35 Q. After you ceased to be a member of the firm of John Finzer & Bros., did you go into business for yourself?

A. Yes, sir.

The part of the said R. Finzer's deposition contained in from the 50th to the 51st questions therein, both inclusive, and the answers thereto, which question and answers are as follows, to wit:

50 Q. When was the charm, the impression of which you have put in evidence, made?

A. In 1874.

51 Q. When was the trade mark put upon it?

A. In 1874.

The part of the said R. Finzer's deposition contained in from the 57th to the 60th questions therein, both inclusive, and the answers thereto, which questions and and answers are as follows, to wit:

57 Q. I will show you another label in three parts and ask you what that is?

A. That is a miniature label; one of them a copy of the large label and intended to be placed on a single plug.

58 Q. How was that used?

A. I never saw it used.

36 59 Q. How was it intended to be used?

A. To be put on a single plug.

60 Q. I now show you three labels and ask you what they are?

A. They are copies of my starlight, sunlight, and moonlight brands.

The part of the said R. Finzer's deposition contained in the 85th, 89th, & 90th cross-questions, so far as they refer to the charm mentioned therein, and the answers thereto, so far as they refer to said charm, which questions and answers are as follows, to wit:

85 Cross-Q. This mark which you call your trade mark—an impression from your seal which you have put in evidence as "Rudolph Finzer charm"—that is the same mark that you say that you have on your bill-heads, is it not?

A. I have not seen the bill-heads recently.

89 Cross-Q. That mark was only used on the bill-heads and stationery?

A. No, sir; the mark was used on the show-cards and used in various ways as the "charm" is evidence, which was made in 1874.

90 Cross-Q. But you didn't mark it, as shown on the

37 "charm" or on the bill-heads, on your tobacco, did you?

A. Yes, sir.

The part of the said R. Finzer's deposition contained in from the 105th to the 114th cross-question- therein, both inclusive, and the answers thereto, which questions and answers are as follows, to wit:

105 Cross-Q. In your direct examination you have referred to Ehibit "Cameron No. 1," which bears the name Starlight, of Australia, you have stated that that was used as a brand for tobacco in 1859. What enables you to say that?

A. From information from the gentleman who was foreman in the factory.

106 Cross-Q. Do you know whether that label is used now or not?

A. It is used now.

107 Cross-Q. Has it been continually used?

A. Yes, sir; from what information I have.

108 Cross-Q. You don't know it of your own personal knowledge?

A. No, sir.

109 Cross-Q. You don't know, of your own personal knowledge, whether it is used to-day?

38 A. No, sir.

110 Cross-Q. You don't know, of your personal knowledge, when it was first used?

A. No, sir.

111 Cross-Q. You have stated in your direct examination that

these three symbols attached together, one of which seems to be a small copy of the large label "Cameron," was intended to be placed on the plugs of tobacco. How do you know that it was intended to be placed on the plugs of tobacco?

A. It is evidently intended to be placed on the plugs.

112 Cross-Q. You don't know it?

A. No, sir.

113 Cross-Q. You never saw it affixed to any plugs?

A. No, sir.

114 Cross-Q. And you don't know that it ever was affixed to any small plugs of tobacco?

A. No, sir.

To all of the rulings by the court the defendant then excepted and still excepts, and prays that this his bill of exceptions
39 may be signed, sealed, and enrolled and made a part of the record in this cause, which is done.

JNO. W. BARR, *Judge.*

On the hearing of the above-entitled cause the complainant read and relied on the following matters, to wit: The bill of complaint, the replication, the depositions of John E. Liggett, John W. Denning, John N. Drummond, James G. Butler, Henry Dansman, M. C. Wetmore, J. A. Ladd, H. J. Brown, Christian Peper, J. E. Liggitt, recalled, G. S. Myers, G. S. Myers (in rebuttal), and M. I. Barker, and the exhibits therewith, to wit, Complainant's Exhibits "Liggett & Myers' Star Tobacco" and "Finzer Tobacco."

And the defendant read and relied on the following matters, to wit: The answer, the depositions of Edward Holbrook, H. Wirgman, M. S. Preston, H. Wrigman, recalled, David Musselman, H. W. Rudolph, Joseph G. Starr, John Miller, Charles C. Voght, John Finzer, Lewis N. Senior, except the following parts of the said Senior's deposition, excluded by the court, to wit, the part con-
40 tained in from the 16th to the 51st questions thereof, both inclusive, and the answers thereto, and Rudolph Finzer, except the following parts of the said Finzer's deposition, excluded by the court, to wit, the parts contained in from the 30th to the 35th questions, both inclusive; the 50th to the 51st questions, both inclusive; the 57th to the 60th questions, both inclusive; the 85th to the 92nd cross-question-, both inclusive, and the 105th to the 114th question-, both inclusive, and the answer- to all of the said questions, and the exhibits therewith, to wit, Defendant's Exhibits "Holbrook Brand," "Holbrook Nos. 2 and 3," "John Finzer & Bros. No. 1," "Liggett & Myers' Plug," "Rudolph Finzer Plug," "John Finzer & Bros. No. 2," "John Finzer & Bros. No. 3," "Cameron," "Cameron No. 2," "Rudolph Finzer Nos. 1, 2, & 3," and Rudolph Finzer No. 4.

Decree.

This cause came on to be heard and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and

decreed as follows, viz: That the bill of complaint herein be, and the same is hereby, dismissed, and that the defendant, Ru-
41 dolph Finzer, recover of the complainant, The Liggett & Myers Tobacco Company, his costs herein expended, to be taxed, and he may have execution, &c.

The parties, by their counsel, filed their stipulation herein.

In deciding this case the court delivered a written opinion, which is filed.

The stipulation above referred to is in words and figures as follows:

Stipulation.

Circuit Court of the United States for the District of Kentucky. In Equity.

LIGGETT & MYERS TOBACCO COMPANY *vs.* RUDOLPH FINZER.

It is hereby stipulated by and between the parties hereto, by counsel, that the printed records filed herein May 26, 1885, by the parties, respectively, shall be the record in this cause, so far as the depositions therein contained are concerned.

JAMES A. BEATTIE,
Solicitor for Def't.

PAUL BAKEWELL,
Solicitor for Complainant.

The opinion referred to above is as follows, to wit:

42 *Opinion.*

LIGGETT & MYERS TOBACCO CO. *vs.* RUDOLPH FINZER.

The complainant commenced, in the summer of 1876, to mark a certain kind of plug tobacco manufactured by it with a tin tag made in the shape of a star. This tobacco was put up in pieces weighing a pound, with creases or indentures indicating the size of the plugs into which it was to be cut, and between each indenture was fastened a tin tag into the tobacco by means of prongs in the center and points of the star.

The complainant continued to use this kind of a star as a trade mark from the summer of 1876 until the present time, and now seeks by this bill to enjoin the defendant from using on plug tobacco manufactured by him a round gilded paper in the center of which is a red star and under the star the word "light." This paper has on one side of the red star the word "trade" and on the opposite side the word "mark," and it is stuck to the tobacco with
43 mucilage. The plugs of tobacco upon which this paper is used is of a different weight and size from that maufactured by complainant.

There is a material difference in *in* the appearance of the tobacco manufactured by defendant from that manufactured by complainant, and the trade mark used by defendant has no resemblance to

that used by complainant, except they both use the design of a star.

There is no evidence in the record that defendant's tobacco has ever been taken for that of the complainant's, and an inspection of the two trade marks satisfies me that there is no probability that defendant's tobacco will ever be sold as complainant's manufacture, even to the most incautious person who has ever seen complainant's tobacco and trade mark.

The complainant, however, insists that the plug tobacco manufactured by it and which has been put upon the market with the mark of a star has become known by the trade and public as
44 "Star" plug tobacco, and that by reason thereof complainant has the sole and exclusive use of the design of a star upon plug tobacco as a trade mark. It also alleges that it was the original manufacturer of plug tobacco with the design of a star affixed to the plugs and the first to introduce it to the public.

The defendant's answer admits that complainant's plug tobacco has become known to the trade and public as "Star" plug tobacco, and that it is purchased by the name of "Star" tobacco, but denies that complainant was the first to introduce the design of a star on plug tobacco or in connection therewith.

The testimony proves that complainant was the first to use the design of a star made of tin and fastened on the plug of tobacco as described, but that it was not the first to use the design of a star to designate a particular kind of plug tobacco in the market.

The defendant's old firm, Finzer Brothers, used the design of a star on the boxes in which their tobacco was put upon the
45 market, and also upon a wrapper of tin foil with which they covered their plug tobacco. The one was called by them "Silver Star" and the other "Star of the West," but neither bore any resemblance to complainant's trade mark. These designs were used before and after 1876. There is evidence offered tending to show that the word "star" or the design of a star was used by other manufacturers upon their boxes of tobacco.

It is insisted by the learned counsel of the defendant that as the word "star" and the design of a star had been used previously to 1876 and at that time to designate a particular make of plug tobacco by other manufactures, complainant could not acquire the exclusive right to use every kind of design of a star, even though such prior use by others have since ceased, but that complainant's right and property is confined to its particular design of a star.

It is unnecessary to decide whether the complainant's use of the design of a star and the habit thereafter of the trade and the
46 public to designate its plug tobacco as "Star" tobacco could give it the exclusive right to use every design of a star or the word itself unaccompanied by other words or designs to designate its plug tobacco.

However this may be I am clearly of the opinion that complainant's use of its design of a star and the habit of the trade and the public to designate its plug tobacco as "Star" tobacco does not prevent the defendant from using as a trade mark the design of a star

in combination with the word "light," meaning "starlight," because such use does not in fact deceive, nor is it calculated to deceive either the trade or the public into purchasing defendant's tobacco as tobacco manufactured by the complainant.

If it be conceded that the design of a star was an arbitrary selection by complainant, and that the subsequent habit of the trade and public of calling complainant's plug tobacco "Star" tobacco has extended his trade, made so as to cover every design of a star, although such other designs may not tend to deceive the trade
47 and public, it would be going much beyond reason and any authority known to me to extend complainant's exclusive right to every design of a star in combination with other words or designs without regard to the fact whether the trade and public was thereby deceived or intended to be deceived.

The complainant's bill should be dismissed with costs, and it is so ordered.

And on another day of said February term, to wit, on Tuesday, June 16th, 1885, came the complainant, by Paul Bakewell, Esq., its counsel; came also the defendant, by his counsel, James A. Beattie, Esq.

Order Fil. Pet'o. for Rehearing.

The complainant, by counsel, filed its petition for rehearing herein, and said cause, coming on to be heard upon said petition, was argued by counsel, and the court, not being advised thereof, takes time.

Said petition for rehearing is as follows:

Petition for Rehearing.

Circuit Court of the United States in and for the District of Kentucky. In Equity.

THE LIGGETT & MYERS TOBACCO COMPANY

vs.

RUDOLPH FINGER.

48 And now comes complainant in the above-entitled cause and respectfully petitions this court to grant it a rehearing for the following reasons.

1st. That the court erred in granting judgment for defendant instead of for complainant.

2nd. That it appears from the pleadings and testimony in this case that complainant is entitled to relief prayed for in its bill.

3d. That the court erred in not striking out and in considering that testimony which complainant asked to have stricken out, and which was marked in its printed record and called for by its motion to strike out.

PAUL BAKEWELL,
Solicitor for Complainant.

And on another day of said February term, to wit, on Tuesday, July 7th, 1885, came the parties by their counsel. The court, being now advised of the complainant's petition for a rehearing, filed a response herein.

Order Overruling Pet'o. for Rehearing.

It is therefore decreed and ordered that said petition be, and the same is hereby, overruled.

49 The response above referred to is as follows, to wit:

Response.

LIGGETT & MYERS TOBACCO CO., Complainant,

vs.

RUDOLPH FINZER.

Response to petition for rehearing.

The learned counsel for the complainant is mistaken in thinking the decree in this case was induced to any extent by the evidence of the defendant, which he claims should have been excluded. Although that evidence may be material in one view, it did not have any effect upon me in reaching a conclusion.

There is no evidence in the record that the defendant's tobacco upon which his trade mark is placed has ever been sold as the tobacco of complainant, nor that defendant's tobacco thus marked is likely to be taken for that of the complainant. An inspection of the two trade marks and the tobacco upon which they were placed satisfied me that neither traders in tobacco or the most incautious buyer who had ever seen complainant's trade mark or tobacco would mistake defendant's tobacco or trade mark. There is,

50 therefore, neither actual or probable deception in the use of defendant's trade mark, nor is there any probable injury to complainant's property rights.

If it be conceded that complainant has the exclusive right to the use of the name "Star," as applied to plug tobacco, still he has not made out a case for an injunction against the defendant.

The defendant has been using his trade make since the spring of 1882, and there is no evidence proving that his tobacco is known by any one as "Star" tobacco. The use of the design of a "star" in combination with the word "light" would indicate that, if defendant's tobacco has any distinctive name, it would be called "Starlight" tobacco, and the probability of this is increased by the fact, which is proven, that the defendant has always called it "Starlight" and the companion brands he calls "Sunlight" and "Moonlight" tobacco.

I have examined with care the authorities referred to by counsel and other authorities, and deem in unnecessary to review them, but assuming the law to be as broad and comprehensive as stated

51 by Lord Chanworth, in Seixo *vs.* Provegende, 12 Jurist, 215, still I think complainant has wholly failed to make out a case for an injunction.

The mere possibility that some one may hereafter mistake defendant's tobacco for that of complainant, or call defendant's tobacco "Star" tobacco instead of "Starlight" tobacco, is not sufficient to authorize this court to issue an injunction.

The correct doctrine upon this subject is that announced by Vice-Chancellor Hall in Cope *vs.* Evans, L. R. 18, Eq. R. 115, who, after reviewing the English authorities, said: "From these judgments I take it that the law of the court is that it will not grant the injunction unless it is satisfied that there will be deception, or that there is probability or likelihood of deception, or, in Lord Kingsdown's words, that what the defendant does is calculated to deceive."

The hearing is therefore refused.

In regard to the question of whether or not affidavits may now be filed to show that the amount in controversy is sufficient to
52 give complainant an appeal, I am of the opinion that it may be done.

In Course *vs.* Stead and Williamson *vs.* Knicaid, 4 Dallas, 20 & 19, this was permitted in the supreme court, and in *ex parte* Bradstreet, 7 Pet., 647, that court recognized the right of a party to give evidence of the value in a mandamus case in the lower court, with a view of having the case revised by the supreme court; that court by rule 13, adopted Aug. 15th, 1800, authorized the plaintiff in error to show by affidavits to the satisfaction of the court that the matter in dispute was over $2,000—the amount which was then necessary to give that court jurisdiction.

This rule was omitted in the revision of the rules made at the December term, 1858, and again in the revision adopted at the October term, 1883. The court, however, in The Grace Girdles, 6 Wallace, 441, allowed the amount in controversy in an admiralty cause to be shown by affidavit.

The omission of this rule 13 from those now promulgated may indicate that the court will not hear evidence upon this sub-
53 ject; and, if so, there is the greater reason why the lower courts should permit it.

In May *vs.* Sloan, 101 U. S., 232, the court determined that the fact that the appellee who raised the objection to the jurisdiction purchased the land at the price of $21,000, and appellant's affidavit to the petition for an appeal which stated the matter in controversy was over $5,000 was sufficient to give the court jurisdiction.

This was a suit to compel a conveyance and for an injunction against the defendant attempting to get possession of the land during the pendency of the suit.

Injunction suits are often brought when the damage already done is merely nominal, but the granting or refusing the injunction may involve vast sums or interests which would be worth vast sums. Unless such interest can be ascertained and valued the loseing party would be without remedy in the supreme court.

In State Mo. *vs.* Bell Telephone Co., 23 Fed. R., 544, the learned court, Judges Brown & Treat, indicated that in such cases
54 the proper practice was to show the amount in controversy by affidavits.

And on another day of said February term, to wit, on Tuesday, July the 14th, 1885, came the parties, by their counsel. The complainant, by counsel, filed the affidavit of John E. Liggett herein; the defendant, by counsel, filed his affidavit herein.

The affidavit of John E. Liggett above referred to is as follows:

Affidavit of J. E. Liggett.

In the Circuit Court of the United States in and for the District of Kentucky. In Equity.

LIGGETT & MYERS TOB. CO.
vs.
RUDOLPH FINZER. } ※ 5777.

John E. Liggett, being duly sworn, on his oath says:

I am president of the Liggett & Myers Tobacco Company, complainant in this suit. I have read the bill in equity in this cause, and I know that the matters and things therein stated involve the protection of the complainant in the good will of its business in the manufacture and sale of plug tobacco known as "Star Tobacco," and that the good will of complainant's business in the manufact-
55 ure and sale of "Star Plug Tobacco" exceeds, for every year, the sum of five thousand dollars, exclusive of costs, and that the matter in dispute in this action, exclusive of costs, exceeds the sum or value of five thousand dollars.

JOHN E. LIGGETT.

Subscribed and sworn to before me this eighth day of July, 1885.
[SEAL.] W. H. SCUDDER, JR.,
Notary Public, City of St. Louis, Mo.

The affidavit of the defendant above referred to is as follows:

Affidavit of Defendant.

In the Circuit Court of the United States for the District of Kentucky. In Equity.

THE LIGGETT & MYERS TOBACCO COMPANY
vs.
RUDOLPH FINZER. } No. 5777.

Rudolph Finzer, being duly sworn according to law, states that he is the defendant in this cause; that both in the oral argument and brief for the complainant at the hearing of the said cause complainant's counsel stated that neither damages nor profits were sought in this suit; that all that was asked for on the part of com-
56 plainant was an injunction; that on page 32 of the printed brief, filed on behalf of complainant at the hearing in this court, it is said: "Complainant, asking merely for an injunction, not damages, comes before this court of equity showing this existing state of facts," &c., &c.

Affiant further states that he is familiar with and understands the matters in controversy in this cause; that it is not true that the matter in dispute in this action or suit, exclusive of costs, exceeds the sum or value of five thousand dollars; that, as affiant understands the decision of the court in this cause, and as he is advised, it does not affect the validity of the trade mark claimed by complainant as set out in its bill of complaint in this cause, but leaves the complainant in the full possession, use, and control of its said trade mark, and that the protection of the complainant in the goodwill of its business and the manufacture and sale of plug tobacco known as "Star Tobacco" is not involved or affected herein, and that the manufacture and
57 sale by defendant of his tobacco known as "Starlight" and described here in the pleadings has not, does not, and will not affect the good will of complainant's said business and manufacture and sale of "Star Tobacco" in any sum, degree, or way whatsoever.

RUDOLPH FINZER.

Subscribed and sworn to before me by Rudolph Finzer this 13th day of July, 1885.

JAMES A. BEATTIE,
Com'r Cir. C't U. S. Dist. Ky.

Order Filing Affidavits.

And on another day of said February term, to wit, on Saturday, July the 18th, 1885, came the complainant, by counsel, and filed the affidavit of John E. Liggett herein; came also the defendant, by counsel, and filed his affidavit herein.

Order Granting Appeal.

Thereupon the complainant, by said counsel, prayed an appeal from the decrees herein to the Supreme Court of the United States, which is granted.

Order Approving Appeal Bond.

The complainant tendered its appeal bond herein, which is approved and ordered to be filed.

58 The affidavit of John E. Liggett, above referred to, is as follows:

Affidavit of Jno. E. Liggett.

In the Circuit Court of the United States in and for the District of Kentucky. In Equity.

LIGGETT & MYERS TOB. CO.
vs.
RUDOLPH FINGER. } No. 5777.

John E. Liggett, being duly sworn, upon his oath says that the matter in dispute in the above-entitled action, exclusive of costs, exceeds the sum or value of $5,000.00.

Affiant further says that he is the president of the complainant company; that he has read the bill in equity in this cause and knows that the matters and things therein stated involve the protection of complainant in the good will of complainant's business in the manufacture and sale of plug tobacco known as "Star Tobacco," and that the good will of complainant's business will be effected injuriously by the decision of the trial court in this cause every year that the said decision remains in force to an amount that cannot be exactly *exactly* estimated, but that certainly far exceeds five thousand dollars.

59 Affiant further says that the right asserted by deponent, and upheld by the court in its decision, to use the word or symbol "Star," in combination with other words or symbols, in violation of the right asserted by complainant in this action, to the exclusive use of the word or symbol "Star" on plug tobacco, is extremely injurious to plaintiff, and that the right to the exclusive use of the word or symbol "Star" on plug tobacco, asserted by complainant and denied by the trial court by the decree in this action, is worth to complainant much more than $5,000.00, to wit, more than $50,000.00.

Affiant further says that the matter in dispute in this action is complainant's exclusive right to the word or symbol "Star" on plug tobacco, which matter, exclusive of costs, exceeds the sum or value of $5,000.00.

Affiant further says that complainant is, and for many years has been, a manufacturer of plug tobacco on a large scale in St. Louis, Missouri, and has yearly for many years expended large sums

60 in building up a reputation for its "Star" plug tobacco and in establishing its peculiar and exclusive right to use word or symbol of a star on plug tobacco, and that the contention in the present cause on behalf of complainant is, as shown by the pleadings, proofs, and arguments in this behalf, that complainant's symbol of a star has given to its goods the name of that symbol, and that it is inequitable to allow defendant to use that symbol on the same class of goods, though defendant's symbol be different in other respects, because the fact that the symbol of a star had given its name to complainant's mark shows a probability that the same symbol in defendant's mark would give a like name to defendant's goods. This court, having held that no such probability appears, and that the symbol or name of Star may be used by defendant, and consequently by other tobacco manufacturers on plug tobacco, when associated with other symbols, has thereby

61 opened wide the door, as complainant contends, to the infringement of complainant's good will, and judicially determined that complainant has not the exclusive right to the word or symbol "Star" on plug tobacco, which exclusive right is the matter in dispute, and is worth to complainant, as affiant believes from his knowledge of complainant's business, over $50,000.00, and which is worth more than $5,000, exclusive of costs.

Affiant further says that the matter in dispute in this case involves the right of complainant to the exclusive right of the symbol of a star on plug tobacco, and to prosecute its business of manufacturing

plug tobacco by the mark of a star upon its plugs to the exclusion of any such right in defendant or in any other manufacturer of plug tobacco, and that this right and matter in dispute exceeds the sum of $5,000, exclusive of costs.

Affiant says that be reason of the well-known character of complainant's tobacco, and of the large sums expended by com-
62 plainant in advertising and introducing the same, the right to the word or symbol "Star" on plug tobacco, whether in combination with the word "light" or not, is worth more than $5,000, and exceeds that sum, exclusive of costs, and that the injury to complainant by the use of such symbol as that used by defendant and complained of in this action on plug tobacco not manufactured by complainant exceeds the value of $5,000, exclusive of costs.

Affiant further states that the sales of complainant's "Star" plug tobacco have during the past five years exceeded the sum of $2,700,000 per year, and that the denial to complainant of the restraining order prayed in the above-entitled cause is a loss to complainant in its sales of "Star" plug tobacco which cannot be accurately estimated, but which far exceeds the sum of five thousand dollars, exclusive of the costs of this action.

JOHN E. LIGGETT.

63 Sworn to and subscribed before me this 16th day of July, 1885.

[SEAL.] PAUL F. COSTE,
Notary Public, City of St. Louis, Mo.

The affidavit of the defendant referred to above is as follows:

Affidavit of Defendant.

In the Circuit Court of the United States for the District of Kentucky.
In Equity.

THE LIGGETT & MYERS TOBACCO COMPANY
vs.
RUDOLPH FINZER. } No. 5777.

Rudolph Finzer, being duly sworn according to law, deposes and says that he is the defendant in the above-entitled cause; that he was present at the hearing of the said cause and heard the argument of the counsel for the complainant therein; that in his said argument the said counsel stated that the complainant sought neither profits or damages, but only an injunction in said cause, and that on page 32 of his printed brief filed in said cause said counsel uses the following language, to wit: "Complainant, asking merely for
64 an injunction, not damages, comes before this court of equity showing this existing state of facts."

And affiant further deposes and says that it is not true that the matter in dispute in the above-entitled action, exclusive of costs, exceeds the sum or value of $5,000.00 in any of the aspects or states

of case set out in the affidavit of John E. Liggett, filed this 18th day of July, 1885, or in any way, aspect, or state of case whatsoever.

RUDOLPH FINZER.

Subscribed and sworn to before me by Rudolph Finzer this 18th day of July, 1885.

SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *D. C.*

The appeal bond referred to above is in words and figures as follows, viz:

Appeal Bond.

Circuit Court of the United States, District of Kentucky.

THE LIGGETT & MYERS TOBACCO COMPANY
vs.
RUDOLPH FINZER.

65 Know all men by these presents that we, the Liggett & Myers Tobacco Company, principal, and J. H. Lindenberger, surety, are held and firmly bound unto Rudolph Finzer in the sum of five hundred ($500.00) dollars, to be paid to the said Rudolph Finzer, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this eighth day of July, A. D. 1885.

Whereas the above-named Liggett and Myers Tobacco Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Liggett and Myers Tobacco Company shall prosecute its said appeal to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void;
66 otherwise the same shall be and remain in full force and virtue.

LIGGETT & MYERS TOBACCO COMPANY,
By J. E. LIGGETT, *Pres'd't.* [L. S.]
J. H. LINDENBERGER. [L. S.]

Sealed and delivered in presence of—
SAM'L B. CRAIL.

Approved July 18th, 1885.

JNO. W. BARR, *Judge.*

And on another day of said February term, to wit, on Tuesday, July 28th, 1885, came the complainant, by Paul Bakewell, its counsel, and filed its assignment of errors herein, which said assignment of errors is as follows, to wit:

Assignment of Errors.

Circuit Court of the United States in and for the District of Kentucky. In Equity.

LIGGETT & MYERS TOB. CO.
vs.
RUDOLPH FINZER. } No. 5777.

And now comes the said complainant and says that in the record and proceedings of the said court in the above-entitled cause there is manifest error, and for error said complainant assigns the following, to wit:

67 1. That said court admitted improper and illegal testimony offered by defendant.

2. That the judgment of the said court was both against the law and the evidence.

3. That the court erred in dismissing complainant's bill.

4. That the court erred in not granting a decree for complainant.

5. That the court erred in overruling complainant's motion for a new trial or rehearing.

D. W. SANDERS,
BAKEWELL & BAKEWELL,
Solicitors for Complainant.

The evidence read on behalf of the complainant and defendant on the hearing of this cause is as follows, viz:

68 *Complainant's Testimony-in-Chief.*

Testimony taken on the part of the complainants in the case of the Liggett & Myers Tobacco Company *v.* Rudolph Finzer, under the sixty-seventh rule of practice for courts of equity of the United States, April 8, 1884, at the office of Paul Bakewell, No. 417 Olive street, St. Louis, by L. L. Walbridge, special examiner, appointed by the United States circuit court to take testimony in said cause.

Plaintiff's solicitor offers in evidence a piece of tobacco with Liggett & Myers' star mark upon it, and the same is marked "Complainant's Exhibit Liggett & Myers' Star Tobacco."

Complainant's solicitor offers in evidence a piece of tobacco admitted by defendant to be manufactured by him, and the same is marked "Complainant's Exhibit Finzer Tobacco."

JOHN E. LIGGETT, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co., as follows, viz:

1 Q. What is your name, age, residence, and occupation?

A. My name is John E. Liggett; I am 58 years old; reside in St. Louis, and am a manufacturer of tobacco.

2 Q. What is your position or relation with the Liggett & Myers Tobacco Co.?

A. I am president of the Liggett & Myers Tobacco Co.

3 Q. How long had the Liggett & Myers Tobacco Co. been in existence as a company?

A. I think it is about six years; it was first Liggett & Myers, then the Liggett & Myers Tobacco Co., in accordance with the law requiring the word company to be affixed to the name of the firm.

69 4 Q. Is the Liggett & Myers Tobacco Co. the successor in business to Liggett & Myers?

A. Yes, sir.

5 Q. What was your occupation and business in the years 1875 and 1876?

A. Manufacturer of tobacco, occupying the same position I do now—that is, a member of the firm of Liggett & Myers then, I think.

6 Q. The predecessors in the business of the Liggett & Myers Tobacco Co.?

A. Yes, sir.

7 Q. When did you first mark your plug tobacco with a star?

A. In 1876.

8 Q. What mark was it you affixed on that date?

A. About in July or August, I think, we commenced manufacturing pound plug tobacco from the white Burley leaf, and we put it on the plug tobacco.

9 Q. When you first marked a star on your plug tobacco how did it resemble the mark of a star on Complainant's Exhibit Liggett & Myers' Star Tobacco?

A. The same—a similar star.

10 Q. At that time, in 1876, when you say you first marked a star on your plug tobacco, did you know of any other manufacturers anywhere who marked a star on their plug tobacco?

A. No, sir.

11 Q. Did you, in 1876 or since then, mark your plug tobacco with a star mark of any other material than tin, as shown in the Complainant's Exhibit Liggett & Myers' Star Plug Tobacco?

A. We had some silver-foil stars made exactly like that, and we had another paper—golden paper—with a star on it, and we used them sometimes, but I don't know as we put them in the trade.

12 Q. When was that?

A. That was along about 1877 or 1878.

13 Q. Please look at Complainant's Exhibit Liggett & Myers' Tobacco Co.'s Star No. 2 and state whether or not this was a mark manufactured by your order for plug tobacco manufactured by you.

A. That is one of them.

14 Q. You say you did not use that in the trade?

A. Not in the trade.

70 15. Q. Can you give any reason for not using that in the trade?

A. It didn't stick on the plug so well and wasn't as plainly seen.

16 Q. So you abandoned the notion of using it?

A. Yes, sir; we didn't use them any more than to experiment with them. I don't know that we ever sent out any. I am not positive about that, but I don't think we did.

17 Q. When was that?

A. Some time in 1877 or 1878; I can't say exactly when without looking the matter up, but it was previous to 1879.

18 Q. Where was that mark made?

A. I think that was made in Louisville, sir.

19 Q. Do you remember who made it?

A. My impression is it was the Louisville Lithograph Co.; I think that is the style.

20 Q. Have you any bill of the Louisville Lithograph Co. or the makers of that mark—a receipted bill?

A. I don't know, sir; I suppose we have.

21 Q. Why did you mark your plug tobacco with a star made of tin instead of any other material?

A. Because it is easily affixed and is very conspicuous; the main reason is on account of the ease with which it is placed on the plug tobacco, and the firmness with which it adheres; you can't get it out without force; this (paper exhibit marked No. 2) comes off and we have to use stickers on the paper.

22 Q. Has the mark on plug tobacco which you claim any particular feature, so far as being made of tin is concerned?

A. No; we never speak of it as a tin tag; we speak of it as star tobacco only.

And in answer to cross-interrogatories proposed to him by JAMES A. BEATTIE, Esq., counsel for Rudolph Finzer, as follows:

23 X Q. If I understand you, you commenced the manufacture of this tobacco, of which you have filed a sample, marked Complainant's Exhibit Liggett & Myers' Star Tobacco, in 1876?

A. Yes, sir.

71 24 X Q. That was manufactured in pound lumps, was it?

A. Yes, sir.

25 X Q. How many pieces of the size of the exhibit just referred to would constitute a pound lump?

A. I think eight of them.

26 X Q. In a continuous bar?

A. In a continuous bar; they can be spaced any space you want and you can put as many stars as you want. We make them sometimes seven space and sometimes nine.

27 X Q. That style of tobacco of yours is always made of this white Burley tobacco, is it?

A. Yes, sir.

28 X Q. And you use that star mark that appears on this exhibit only on that style of tobacco?

A. So far we have always used that kind, but we don't confine ourselves to that particularly?

29 X Q. But so far you mark this style of tobacco with that star?

A. Yes, sir; but we have used it on other kinds.

30 X Q. Now, haven't you always marked that tobacco with the tin-tag star mark that appears on this exhibit?

A. For the trade, yes, sir; we may possibly have sent out a little with the paper on; I don't know that positively.

31 X Q. But this tin-tag star mark is the characteristic of the Liggett & Myers pound lump tobacco made of the white Burley leaf, is it not?

A. The star is the characteristic, and what we call it "the star;" we never say "tin star," or anything of the kind, but we have used the tin star always.

32 X Q. You have always put the tin star on it?

A. Yes, sir; with the exception as I mentioned before.

33 X Q. As far as you can now remember, you have never put forth any of that tobacco to the trade with any other mark on it than just the tin-star tag?

A. I don't think we have, unless it was a very little.

34 X Q. That tobacco is of very fine quality, is it not?

A. So said to be.

35 X Q. And it has met with an extensive sale, has it not?

A. Rather.

72 36 X Q. It is universally known to the trade, is it not?

A. As the star tobacco; yes, sir.

37 X Q. It is universally known to the trade as the Liggett & Myers' tobacco manufacture, and distinguished and designated by that tin star mark on it?

A. By a star.

38 X Q. But by that star mark?

A. That is what we have always used, except as I said before.

39 X Q. And that is the way it is known to the consumers?

A. It is known to the trade as star tobacco.

40 X Q. I know; but when you come to attach the name "star tobacco" to the plug, what sort of a plug is it attached to; is it not attached to a plug with a tin star?

A. Attached to a pound lump as a rule.

41 X Q. They have a tin star on them?

A. Yes, sir; our orders for star tobacco.

42 X Q. In answer to the demand for star tobacco you send the white Burley pound lumps?

A. Yes, sir.

43 X Q. Marked by the tin-star tag?

A. Yes, sir.

44 X Q. And you have never done anything else?

A. Except as mentioned before.

45 X Q. You spoke of a foil star, or a star on foil?

A. Yes; not a foil star — silver paper.

46 X Q. Did you use that to any extent?

A. Same as the other, to try to see how it would stick; just stuck it on the plug tobacco, but it didn't stick very well.

47 X Q. You used that star or foil, I understand, only experimentally, to see how it would do, in the same manner as you used complainant's Exhibit, Liggett & Myers Tobacco Star, marked No. 2?

A. We had them made and put them on the tobacco, but they were inconvenient to put on—didn't stick very well—and for that reason we preferred the other.

48 X Q. So you sent neither of these styles out to the trade?

A. Not as a rule, we did not. There may have been some sent out, and I think likely there was.

49 X Q. But Liggett & Myers' star tobacco never became
73 known to the trade as distinguished by these paper or foil labels.

A. I presume not, as they were not used to any extent.

50 X Q. What induced you to experiment with these paper and foil labels that you speak of?

A. There was some question as to whether we could use tin or not.

51 X Q. Wasn't Lorillard claiming a patent on the tin tags?

Objected to as incompetent, immaterial, and irrelevant, and as not proper on cross-examination.

A. Yes, sir.

52 X Q. You didn't know whether you could establish that patent or not, but you were looking around for something as a substitute for this tin star tag, were you?

Objected to as incompetent, immaterial, and irrelevant, and as not proper on cross-examination.

A. Yes, sir.

52 X Q. You didn't know whether you could establish that patent or not, but you were looking around for something as a substitute for this tin-star tag, were you?

Objected to as incompetent, immaterial, and irrelevant.

A. No, sir; we didn't know whether he could sustain it or not, but thought he couldn't, and we proceeded to use something else, if we couldn't use tin, of course.

53 X Q. So your experiments with paper and foil were for the purpose of resorting to them in the event that Lorillard sustained his patent on the tin tag.

A. That is one reason, and another reason was we thought this would be cheaper and more easily affixed until we tried it.

54 X Q. Is it not a fact that the paper mark is more expensive than the tin mark?

A. I don't know; I think not; I never used enough of them to know; I don't think it would be as expensive.

And in answer to redirect interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers' Tobacco Co., he saith as follows:

55 — Q. It was after you had used the star mark, such as is shown in Complainant's Exhibit Liggett & Myers' Star Mark, for about two years, and after your tobacco had become known in the trade as star tobacco, that you got up or attempted to get up the mark shown in Complainant's Exhibit Liggett & Myers' Star Mark, No. 2, wasn't it?

A. Yes, sir.

74 56 X Q. And you did not consider that this mark shown in complainant's exhibit, Liggett & Myers' Star Mark, No. 2 in any way changed your mark of trade, did you?

A. No, sir; I thought it would be the same star; all we claimed was the star.

Examined by Mr. BEATTIE:

57 X Q. There is an obvious difference, isn't there, between the tin-star mark and the paper mark?

A. No difference, except one is metal and the other paper.

58 X Q. Could not any person see the difference in material with good eye-sight, in a moment?

A. Oh, there is a difference in the material, but we never claimed the material on the tin.

59 X Q. But you always put the tin on?

A. Yes; for convenience.

60 X Q. And that became a characteristic of your plug?

A. Yes; I believe it was thought this No. 2 would be as characteristic as the other; all we claimed was the star. We didn't claim the tin star.

61 X Q. You claimed the star, but always embodied it in the form of star tin tags?

A. Because it was more convenient and better to use; if this number 2 would have stuck as well, I would have taken it.

63 X Q. Let me understand you; you claim a star as a mark for tobacco?

A. Yes, sir.

64 X Q. You always embody that mark in the tobacco that you put forth to the trade in the shape of a tin-star tag on the tobacco?

A. For the reason as I stated before.

65 X Q. I don't ask for the reason, but for the fact, whether you did not do that?

A. And I have told you before we always did, except in the case I mentioned where we used paper.

66 X Q. That exception was an experimental use with the paper?

A. With paper.

67 X Q. And the tin foil?

A. Not tin foil; it was silver paper.

75 68 X Q. With paper like exhibit No. 2, but the silver paper is not produced?

A. No; the silver paper is not produced, the other is a *fac simile* of the other.

Examined by Mr. BAKEWELL:

69 X Q. What is the main controlling reason that led you to use

the mark of a star on your plug tobacco made of tin instead of the mark of a star made of any other material?

A. Because it is more easily affixed, more firmly affixed, and you can't get it off without effort. We found the paper very difficult to stick, and we have never been able to make the paper stick with satisfaction.

Signature waived.

JOHN W. DENNING, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co., as follows, viz:

1 Q. State your name, age, residence, and occupation.

A. My name is John W. Denning; I am 69 years old; reside in St. Louis; formerly clerk; I am out of employment at the present time.

2 Q. Did you ever work for the Liggett & Myers Tobacco Co.?

A. I did.

3 Q. When did you cease working for the Liggett & Myers Tobacco Co.?

A. In 1877.

4 Q. What was your occupation in 1875, '76, and '77?

A. Clerk in the store; received orders, filled them, and shipped the tobacco, and had general charge of the shipping business.

5 Q. That is to say you were clerk in the store of Liggett & Myers then?

A. Yes, sir.

6 Q. Do you know what year Liggett & Myers first marked their plug tobacco with a star?

A. In 1876, I think, they first commenced it; that is put the tag on the plug or star.

76 And in answer to cross-interrogatories proposed to him by Mr. BEATTIE, counsel for Rudolph Finzer, as follows:

7 X Q. What sort of a plug did they mark with a star?

A. They marked pound lumps, and, I think, also 3's and 5's for a while.

8 X Q. How long did they continue to mark 3's and 5's?

A. I can't say; I quit their employment in 1877, and they had them marked in that way.

9 X Q. By 3's and 5's you mean three plugs to a pound and five plugs to a pound?

A. Yes, sir.

10 X Q. What sort of tobacco did they use in the manufacture of plugs which they marked with a star?

A. They used the white Burley for a filler.

11 X Q. The star mark was confined to the tobacco made of the white Burley leaf tobacco, was it?

A. Yes, sir; my impression is at that time it was confined to that kind.

12 X Q. In what shape did they put the star on the plug?

A. It was like the Complainant's Exhibit Liggett & Myers' Star Tobacco.

13 X Q. That is, they put on a tin-tag star mark?

A. A star like that; yes, sir.

14 X Q. And they have always continued to mark their tobacco with the tin-tag star mark, haven't they?

A. I think they have.

14 X Q. And the tobacco is universally known in the trade by that characteristic mark, a tin-tag star, is it not?

A. Yes, sir.

16 X Q. Suppose you were to go to a retailer's and ask for star tobacco, and you were handed a plug like Complainant's Exhibit Finzer Tobacco, which is marked with a round label displaying in red on a gold ground a star with the word "light" below in prominent letters, the two together forming the word "starlight," as star tobacco, would you receive it as star tobacco?

Objected to as incompetent, immaterial, and as not growing out of any question on the direct examination.

77 A. Well, being familiar with the one kind of star I should object to the other, because I know it isn't the same.

17 X Q. You would know the starlight tobacco was not the Liggett & Myers' star tobacco?

A. I would judge so; I wouldn't know.

18 X Q. It wouldn't have the characteristic mark of the Liggett & Myers' Star Tobacco on it, would it?

A. No; therefore, as I say, if I was familiar with the one kind I wouldn't receive the other in the place of it.

And in answer to redirect interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co, he saith as follows:

19 X Q. From the time that Liggett & Myers, and afterwards the Liggett & Myers Tobacco Co., marked their plug tobacco with the star such as is shown in Complainant's Exhibit Liggett & Myers' Star Tobacco, their tobacco has been known to the trade as the star tobacco, has it not?

A. It is so known all over the country now.

20 X Q. And ever since they marked their tobacco that way it has been known as the star tobacco?

A. Known as the star tobacco even before it was branded as "star tobacco;" it was ordered as star tobacco.

Examined by Mr. BEATTIE:

21 Q. It has been known as the star tobacco and characterized by that tin-tag star mark, hasn't it?

A. By a star on it; yes, sir.

Signature waived.

JOHN N. DRUMMOND, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co., as follows, viz:

1 Q. State your name, age, residence, and occupation.

A. My name is John N. Drummond; I am forty-seven years of age; I reside in St. Louis; am a tobacco manufacturer.

78 2 Q. What is your present occupation and position?

A. My present occupation is that of a tobacco manufacturer, sir.

3 Q. What relation do you bear to the Drummond Tobacco Co.?

A. I am president of the Drummond Tobacco Co.

4 Q. How long have you been in the tobacco business?

A. I have been in it, sir, for about twenty years.

5 Q. Do know the Liggett & Myers Tobacco Co.?

A. Yes, sir.

6 Q. Are you familiar with their brand of tobacco commonly known as the star plug tobacco?

A. Yes, sir.

7 Q. Is the concern of which you are president engaged now in the manufacture of plug tobacco?

A. Yes, sir.

8 Q. How long have you yourself been conversant with the manufacture of plug tobacco and engaged in the manufacture of plug tobacco?

A. Well, sir, I have been conversant with the manufacture of plug tobacco since two years before the war. During the war I was not, but ever since the close of the war I have been in the business of plug tobacco.

9 Q. Within your knowledge and in view of your experience as a manufacturer of plug tobacco do you or do you not know whether the firm of Liggett & Myers, who preceded the Liggett & Myers Tobacco Co. in business, were the first to manufacture plug tobacco with the mark of a star affixed to the plugs of tobacco?

A. They are the first, sir, that I know of. I don't know of any other manufacturer ever putting a star on plug tobacco prior to the time they used it.

And in answer to cross-interrogatories proposed to him by Mr. BEATTIE, counsel for Rudolph Finzer, as follows:

10 X Q. Mr. Dummond, how, to your knowledge, have the Liggett & Myers Tobacco Co. and their predecessors in business embodied their mark of a star on their plug tobacco; in what shape have they put their star on the tobacco?

A. Well, sir, I have always seen it in the shape of tin.

14 X Q. What is known as a tin-tag star mark?

79 A. Well, it is not known as a tin tag or a tin star, it is known as star tobacco.

12 X Q. I am not speaking of the tobacco now, I am speaking of the mark. How would you designate that sort of a mark?

A. I should call it a tin star, as a matter of course.

13 X Q. Well, isn't it commonly known in the trade—a mark of that kind, pressed in the tobacco, known as a tin tag?

Objected to as incompetent, irrelevant, and immaterial.

A. I can't say how it is known to the trade, sir; I am familiar with how the trade designate or call it, but it is generally, as far as my knowledge goes, called star tobacco.

14 X Q. The tobacco is called star tobacco, we don't dispute that; but when you come to look at the tobacco to see what sort of star they mark it with then you find this tin star universally and all the time used on their tobacco, do you not?

A. Yes, sir; you find a tin star used universally.

15 X Q. Now, what sort of tobacco have they distinguished by that characteristic mark—with a tin star; what is the quality of the tobacco; what sort of tobacco is it made of—the plug?

Objected to as immaterial and incompetent.

A. Well, it is made, as far as my knowledge goes, of white Burley tobacco.

16 X Q. So, to the extent of your knowledge, the Liggett & Meyers Tobacco Co. and their predecessors have always put forth a plug manufactured of white Burley tobacco and marked with this tin star?

A. Yes, sir.

17 X Q. And that is known in the trade as their star tobacco?

A. Their star tobacco; yes, sir.

18 X Q. You say that, so far as you know, the complainants were the first to put a star on the plug.

A. Upon the plug; yes, sir; as far as I know.

19 X Q. Are they the first who have ever named the tobacco star tobacco?

Objected to as incompetent, immaterial, and irrelevant, and improper on cross-examination.

A. That I can't say.

80 20 X Q. How many tobaccos have you ever known designated by the names in which word "star" appeared prior to their use of the star on the tobacco?

Same objection.

A. Well, sir, that I can't tell you for I don't know how long they have used the star in connection with their brand. I know they have used it before they used the star on the plug tobacco, because Dausman & Drummond used the star brand, which they had to quit or did quit at the suggestion of Mr. Liggett as a stencil brand.

Signature waived.

JAMES G. BUTLER, being duly sworn, doth depose and say in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co., as follows, viz:

1 Q. State your name, age, residence, and occupation.

A. My names is James G. Butler; 44 years old; St. Louis; occupation, tobacco manufacturer.

2 Q. How long have you been engaged in the manufacture of tobacco?

A. Eighteen years.

3 Q. How long have you been engaged in the manufacture of tobacco in the city of St. Louis?

A. Eighteen years.

4 Q. How long have you been engaged in the manufacture of plug tobacco?

A. Seven years.

5 Q. Did you deal in plug tobacco before that time?

A. Yes, sir.

6 Q. Do you or do you not from your knowledge and experience in such matters know whether Liggett & Myers, who preceded the Liggett & Myers Tobacco Co. in business, were the first to manufacture plug tobacco with a mark of a star affixed to the plug or plugs of tobacco?

A. They were the first that came to my knowledge—the first that I knew anything about.

Cross-examination waived.

Signature waived.

81 HENRY DAUSMAN, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co., as follows, viz:

1 Q. State your name, age, residence, and occupation.

A. My name is Henry Dausman; I am 61 years of age; I reside in St. Louis; I am a tobacco manufacturer.

2 Q. How long have you been engaged in the manufacture of plug tobacco?

A. Just 40 years.

3 Q. From your knowledge and experience in the manufacture of plug tobacco please state whether or not Liggett & Myers, who preceded the Liggett & Myers Tobacco Co. in business, were the first to mark plug tobacco by affixing the mark of a star on the plugs of tobacco?

A. They were the first to my knowledge; to the best of my knowledge they were the first.

4 Q. You never heard of anybody else before them marking a star on the plugs?

A. No, sir.

Cross-examination waived.

Signature waived.

M. C. WETMORE, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co., as follows, viz:

Q. State your name, age, residence, and occupation.

A. My name is M. C. Wetmore; 38; reside in St. Louis; am a member of the Liggett & Myers Tobacco Co.

2 Q. What is your present occupation?

A. I stay in the office. I have charge of the selling department and matters appertaining to the advertising of the goods.

82 3 Q. What was your occupation in the years 1875, '76, and 1877?

A. Traveling salesman for Liggett & Myers.

4 Q. Where did your business take you to in that period of time?

A. It took me on the Missouri and Mississippi rivers. I think I went to Texas that year, and through Indiana and Ohio, and I made a trip to the Centennial Exposition, in Philadelphia, in 1876.

5 Q. Did your business take you to and fro from those points that you have designated in your last answer?

A. My business didn't take me to Philadelphia. I went there on pleasure, and I transacted some business while there. The other points on the river I went to on business.

6 Q. Did you have to go frequently about the country to those points?

A. I think I made most of the points every sixty days; I am sure I did on the Missouri and the Mississippi rivers as often as sixty days.

7 Q. Do you or not claim to be familiar with the different marks of the trade in plug tobacco about that time, say between 1875 and 1877?

A. Well, yes; as well posted as a man could be that was constantly on the road.

8 Q. Your business was selling for the Liggett & Myers Tobacco Co.?

A. Yes, sir; selling for Liggett & Myers at that time.

9 Q. Did or not that bring you in contact with different manufacturers of plug tobacco?

A. It brought me in contact with their goods; yes, sir.

10 Q. Now, from your knowledge and experience in such matters, was or was not the firm af Liggett & Myers, who preceded the Liggett & Myers Tobacco Co., the first to mark their plug tobacco with the mark of a star by affixing a star to the plug or plugs of tobacco?

A. Certainly the first that ever I heard of marking it that way, and I believe they were the first. I never heard of anybody who claimed that they put a star on plug tobacco before they did.

83 11 Q. Do you know in what year the Liggett & Myers Tobacco Co. first marked their plug tobacco with the mark of a star?

A. I think it was in the year 1876.

And in answer to cross-interrogatories proposed to him by Mr. BEATTIE, counsel for Rudolph Finzer, as follows:

12 X Q. Do you remember what part of the year 1876 they began to manufacture that plug tobacco and mark it with that tin-tag star?

A. To the best of my recollection it was in July; I think I could state as fact that it was in July.

13 X Q. Who were you with prior to the time you engaged with Liggett & Myers?

A. I was with Liggett, Hudson & Butler.

14 X Q. When did you quit the employ of Liggett, Hudson & Co.?

A. I think it was the first of January, 1874.

15 X Q. Whose employ did you go into then?

A. Liggett & Myers.

16 X Q. First it was the firm of Liggett & Myers, wasn't it, and then Liggett, Myers & Co., and then the Liggett & Myers Tobacco Co.?

A. Yes, sir.

Signature waived.

J. A. LADD, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Company, as follows, viz:

1 Q. State your name, age, residence, and occupation.

A. My name is J. A. Ladd; I am 42 years old; I reside in St. Louis; am a salesman.

2 Q. Who are you salesman for?

A. P. Lorillard & Co.

3 Q. How long have you been salesman for Lorillard & Co.?

A. Between 10 and 11 years—about 11.

4 Q. Engaged in the sale of plug tobacco?

A. Yes, sir.

84 5. Q. Where do your travels take you as salesman of P. Lorillard & Co.?

A. On the Missouri River west, Salt Lake, and generally in the Western country.

6 Q. Are you familiar, generally speaking, with the different brands and marks of different manufacturers of plug tobacco in the Western country?

A. Some of them. There are a great many, and it would be impossible to be familiar with all of them.

7 Q. From your experience and knowledge in such matters do you or do you not know whether or not Liggett & Myers, who preceded the Liggett & Myers Tobacco Company in business, were the first to mark their plug tobacco with the figure of a star marked upon it?

A. What kind of a star.

Q. A star made of tin?

A. I know they were not the first to use a tin tag, but I know they were the first to use a star.

8 Q. Do you know of any other manufacturer of plug tobacco that marked a star mark of any kind on plug tobacco prior to the Liggett & Myers Tobacco Company doing so?

A. No, sir.

9 Q. On the plug itself?

A. No, sir.

By Mr. BEATTIE:

10 Q. The star mark that you think they were the first to use on the plug tobacco consisted of a tin-tag star mark pressed into the face of the plug, didn't it?

A. Yes, sir.

Signature waived.

H. J. BROWN, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co., as follows, viz:

1 Q. State your name, age, residence and occupation.

A. My name is H. J. Brown; age, 43; I reside in St. Louis; am with the Greeley, Burnham Grocery Co.

85 2 Q. How long have you been with the Greeley, Burnham Grocery Co.?

A. About three years.

3 Q. What was your business before you were with the Greeley, Burnham Grocery Co.?

A. In the cigar and tobacco business.

4 Q. Before you were with the Greeley, Burnham Grocery Co. did you have any experience in a business way in selling or buying plug tobacco?

A. Yes, sir.

5 Q. Do you claim to be familiar with the brands and marks commonly known and in use in this Western country of plug tobacco?

A. A great many of them, I am.

6 Q. From your knowledge and experience in such matters do you know whether Liggett & Myers, who preceded the Liggett & Myers Tobacco Co. in business, were the first to mark their plug tobacco with the figure or design of a star affixed to the plugs of tobacco?

A. The first that I know of.

And in answer to cross-interrogatories proposed to him by Mr. BEATTIE, counsel for Rudolph Finzer, as follows:

7 Q. That figure or design, which was the first, as far as you know, was a tin-tag star mark pressed into the face of the plug of tobacco?

A. Yes, sir.

By Mr. BAKEWELL:

8 Q. Prior to the time that the Liggett & Myers Tobacco Co. affixed this mark of a star to their plug tobacco do you know of anybody or any manufacturer who marked any kind of a star on the plugs of tobacco?

A. No, I do not.

Signature waived.

CHRISTIAN PEPER, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co., as follows, viz:

1 Q. State your name, age, residence, and occupation.

A. My name is Christian Peper; 57 years old; reside in St. Louis; am a tobacco manufacturer.

86 2 Q. How long have you been engaged in the manufacture of tobacco?

A. Over 30 years, in the city of St. Louis, all this time.

3 Q. All the time?

A. Yes, sir.

4 Q. Have you been engaged in the manufacture of plug tobacco?

A. I have.

5 Q. For how long?

A. Over 30 years.

6 Q. Do you know the Liggett & Myers Tobacco Co.?

A. I do.

7 Q. Please state, from your knowledge and experience in such matters, whether you know of any one prior to Liggett & Myers, who preceded the Liggett & Myers Tobacco Co. in business, who affixed a star mark on plugs of tobacco.

A. I do not.

8 Q. Is or is it not your opinion, from your knowledge and experience in such matters, that Liggett & Myers, who preceded the Liggett & Myers Tobacco Co., were the first to mark plug tobacco with the figure or design of a star?

A. It is my opinion that they were the first that put a star mark on plug tobacco.

And in answer to cross-interrogatories proposed to him by Mr. BEATTIE, counsel for Rudolph Finzer, as follows:

9 Q. That is, as far as you know, they are the first?

A. As far as I know on the plug tobacco; yes, sir.

10 Q. That assumed the form of a tin-tag star mark pressed in the face of the plug, did it not?

A. That is what I am speaking of—pressed into the face of the plug.

11 Q. You have a star brand tobacco yourself, haven't you?

Objected to as immaterial and incompetent.

A. I have.

12 Q. How long have you been manufacturing it?

Objected to for the same reason.

A. Well, I wish to explain. The star brand I have has never been used on plug tobacco—not on the plug tobacco direct.

87 13 Q. How long have you been manufacturing the star brand?

A. That is more than I can tell you, unless I refer to the books.

14 Q. About how long?

A. I can't tell, unless I refer back.

15 Q. Have you manufactured it fifteen years?

A. I can't tell you that; not until I look it over.

16 Q. I don't wish you to tell me exactly the precise time, but about the time.

A. Well, I have used a star brand for a good many years on the outside box, but not on the plug tobacco at no time.

17 Q. Well, a good many years; how long—fifteen or twenty years?

Same objection as before.

A. I can't tell you that, unless I look over the books; I can't do it, because I have so many brands, and I wouldn't make a statement unless I could make a reasonably correct one; all I can say is, I know I have had it a good many years.

16 Q. Did you use the star branded on the outside of the box?

A. Yes, sir.

17 Q. Before the star tobacco of Liggett & Myers was made and introduced into the trade or afterwards?

A. I can't tell you.

18 Q. Do you put any mark on the plug itself of that star brand of yours?

A. None whatever.

19 Q. What do you sell it to the trade as?

Objected to for the same reason as heretofore and as improper on cross-examination.

A. I have sold a star brand both on plug—that is, in boxes, and also on smoking tobacco. When I say smoking that dates back considerably.

20 Q. How did you offer that tobacco to the trade? Did you give it a name when you sold it to the trade; and, if so, what name?

Same objection as heretofore.

88 A. Well, now I am not positive about the name; I can't tell exactly the name.

21 X Q. Didn't you sell it as your star tobacco?

Same objection as heretofore.

A. I sold it under the same name as star tobacco, but to be positive I would want to see the brand if it was of recent date; I could tell it easy enough.

22 Q. Would it take you long to ascertain when you first introduced that tobacco and how you sold it?

Same objection.

A. I don't know as it would; I guess I could ascertain.

23 Q. Could you ascertain in a few minutes?

A. Well, it might be that I could and it might be that I couldn't.

24 Q. Don't you know that that brand of yours, the star brand

on the outside of the boxes of plug tobacco, is older than the star brand of Liggett & Myers on plug tobacco?

Same objection.

A. Well, my answer is this, that I wouldn't make a positive assertion of that until I had run over, for the simple reason that I have run so many brands and got up so many brands that I wouldn't just trust to a dead certainty to my memory unless I had run over; that is my answer, because we have run that brand quite a while I know.

25 X Q. The evidence is here that they run it since 1876.

A. I don't see where the conflict comes in, because there is none that I can see.

26 X Q. That is a question of law for the court to pass on, but we want to get at the fact now.

By Mr. BAKEWELL:

27 X Q. This star brand that you have referred to on cross-examination; you don't use that now, do you?

A. I don't use no star mark at all—not using any star mark of any kind.

28 Q. You have discontinued the use of it?

A. That has been discontinued a good many years—that star mark.

By Mr. BEATTIE:

29 X Q. I understood you to say on cross-examination that you were using it now?

89 A. I didn't state I was using the star mark; I stated distinctly that the word came up as a "star" on the outside of the box, but not the star mark.

30 Q. You used the word star?

A. Yes, sir; but not the star mark itself directly, and when I did use it it was only on the outside.

31 Q. But you are now using the word "star?"

A. I have been.

32 Q. Branded on the box?

A. Yes, on the box; but not the mark with the "star."

By Mr. BAKEWELL:

33 Q. Do I understand you to say you are now using the word star on any tobacco manufactured by you.

A. Not on plug tobacco?

34 Q. You are not using the word star on plug tobacco manufactured by you now as a brand?

A. Not, to my knowledge; but I would'nt say positive; the word star may have been kept up as a word; I won't say positive as to that.

Signature waived.

J. E. LIGGETT, being recalled by the complainant, did thereupon depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co., as follows:

1 Q. In your cross-examination this morning you spoke of having used the mark of a star on plug tobacco made of the white Burley tobacco. Ever since you first begun marking your plug tobacco with the mark of a star have you continuously and universally applied it only to plugs of tobacco made of the white Burley tobacco?

A. No, sir; in my examination this morning I fixed the date of using the star by the date that we used the white Burley. I knew the tobacco was Kentucky tobacco, and I thought it was white Burley, but I find the first star we used was the Kentucky
90 Breckinridge and instead of on the pound lump it was on 4's and 3's, the pound lump came afterwards.

2 Q. What do you mean by 4's and 3's?

A. 4's is a plug an inch and a half broad and six inches long, weighing four to the pound; 3's is a plug three by six inches, usually weighing three to a pound, varying in weight; also made double-thick 3's. I know the tobacco was Kentucky tobacco, and I thought it was white Burley, but I find it was Breckinridge.

3 Q. When did you manufacture 3's and 4's?

A. In July, 1876.

4 Q. That is when you first commenced using the star on any plug?

A. On the plug; yes, sir.

And in answer to cross-interrogatories propounded by Mr. BEATTIE he says:

5 Q. Now, when did you commence manufacturing white Burley tobacco?

A. That was later, probably early in 1877 or late in 1876, I found the pound lump, the first pound lump made from Breckinridge instead of Burley, but since then I have used only the Burley since 1877.

6 Q. You abandoned the manufacture of the other tobacco marked with a tin star?

A. Yes; we don't use the Breckinridge now; that we abandoned.

Signature waived.

G. S. MYERS, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the Liggett & Myers Tobacco Co., as follows, viz:

1 Q. State your name, age, residence, and occupation.

A. My name is G. S. Myers; age, 51; reside in St. Louis, and am a tobacconist.

2 Q. How long have you been in the tobacco business?

A. I have been in it since 1858.

91 3 Q. Have you been engaged in the manufacture of plug tobacco?

A. Yes, sir; exclusively.

4 Q. Were you a member of the firm of Liggett & Myers?

A. Yes, sir.

5 Q. Who succeeded the firm of Liggett & Myers, or was there any change made?

A. Yes, sir; we changed to a joint-stock company.

6 Q. What name?

A. The Liggett & Myers Co.

7 Q. Was any change made then?

A. Yes, sir; a law was passed by the Legislature requiring us to give the name of our occupation—that is, whatever business you carry on as a joint-stock company, and so we changed the name to the Liggett & Myers Tobacco Co.

8 Q. You are now a member of the concern of the Liggett & Myers tobacco corporation?

A. Yes, sir.

9 Q. The Liggett & Myers Tobacco Co. are the mediate successors of Liggett & Myers, are they not?

A. Yes, sir.

10 Q. When did Liggett & Myers first mark their tobacco with the mark of a star affixed to the plug?

A. It was about the first of July, 1876—that is, it might have been a few days earlier or later.

11 Q. Have or have not Liggett & Myers or the Liggett & Myers Co. or the Liggett & Myers Tobacco Co., since July, 1876, continuously used the mark of a star as affixed upon the plugs of tobacco manufactured by them?

A. Yes, sir; continuously.

12 X Q. At the time that you first began to use the mark of a star on plugs of tobacco did you know of any other person or concern that marked their plug tobacco by having a star, any kind of a star, affixed in any way on plugs of tobacco?

A. No, sir; I myself was the getter up of that star brand, and I inquired very extensively, in fact, I got all the information I could, to ascertain and find out whether it was in use so that I wouldn't infringe or come in competition with any one else, and I found that no one had ever used it on plug tobacco. In fact, I think at
92 that time we were the only ones using any kind of a star on plug tobacco, as far as my knowledge goes. I don't think there was a manufacturer, to my knowledge using anything attached to plug tobacco similar to that.

In answer to cross-interrogatories by Mr. BEATTIE he says:

13 X Q. You say you adopted the trade-mark of a star. In what shape did you put that on your tobacco?

A. How do I understand in regard to that?

14 X Q. What substance did you embody your mark and affix it to the tobacco?

A. The shape was the shape of a star; the material we generally used was tin.

15 X Q. A tin-tag star mark impressed into the face of the plug?

A. We never claimed the right to use tin.

16 X Q. I don't ask what you claim, but for the fact, what you used?

A. That is just what I propose to give you.

17 X Q. Very well, now state what you in fact used?

A. Our simple trade-mark was a star; we cut that star out of tin and pressed that into the face of the lumps of tobacco.

18 X Q. Isn't that what you have always used?

A. Yes, sir; with the exception that we had some stars cut out of paper, gilded paper, I believe, both gold and silver paper; they were some of them used; I don't think any quantity of them — put on the market; there might have been some; I don't remember whether there was or not.

19 X Q. Was that just an experiment to see whether you could substitute paper for tin?

A. Well, yes, it was an experiment.

20 X Q. And it was not satisfactory to you and you abandoned it?

A. It wasn't satisfactory; we found they didn't stick very well, and it was not satisfactory to us and we quit using them, and, in fact, never did use them to any extent; we had a good many cut, but we never used them to any extent.

93 21 X Q. What do you use this mark of yours on now; what sort of tobacco?

Objected to as incompetent and immaterial.

A. When we first made it we used it on what we call 4's, afterwards on 3's, and then we used it on pound lumps.

22 X Q. When did you commence using it on pound lumps?

A. I think the early part of 1877 or latter part of 1876 and the early part of 1877.

23 X Q. What peculiar kind of tobacco do you use in the plug on which you put this?

A. First we used it on what we called Green river tobacco; we run that, I suppose, six or seven months, then we changed it to Burley, on pound lumps and also on 4's; we made 4's and sent them to California, a good many 4's, out of Burley tobacco with a star.

24 X Q. So sometime in the early part of 1877 you used the mark on Burley tobacco, and you have never used it since on any other sort of tobacco?

A. Never used it since on any other except the Burley tobacco.

25 X Q. And principally on pound lumps?

A. Principally on pound lumps we made for the California trade, and put a star on what we call double-thick 10's; they were an inch by six inches long—the lumps were.

Signature waived.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, L. L. Walbridge, a notary public within and for the city of St. Louis, State of Missouri, do hereby certify that the foregoing depositions of John E. Liggett, John W. Denning, John N. Drummond, James G. Butler, Henry Dausman, M. C. Wetmore, J. A. Ladd, H. J. Brown, Christian Peper, and J. S. Myers were taken on behalf of the complainant before me, at St. Louis, in the city of St. Louis, on the 8th day of April, A. D. 1884; that said witnesses were by me duly sworn before the commencement of their testimony; that the testimony of said witnesses was written out upon a typewriter from my short-
94 hand notes; that the opposing party was present during the taking of said testimony; that said testimony was taken at the office of Paul Bakewell, Esq., No. 417 Olive street, and was commenced at 10½ a. m. on the 8th day of April, A. D. 1884, and was concluded on that day; that it was then and there agreed by the counsel representing the parties to said cause that said testimony might be taken by me in short-hand, and that the transcript of my short-hand notes of said testimony might be read in evidence on the trial of said cause with the same force and effect to all intents and purposes as if said transcript had been subscribed by said deponents.

I further certify that the foregoing is a true and faithful transcript of my short-hand notes so taken as aforesaid, and that I am not of counsel or attorney for either of the parties to said cause, and in no way interested in the event thereof.

[L. S.] In testimony whereof I have hereunto set my hand and affixed my notarial seal this 9th day of April, A. D. 1884.

95 *Complainant's Testimony in Rebuttal.*

Depositions taken under the 67th Rule of Equity, at the office of Paul Bakewell, Esq., No. 417 Olive street, on behalf of the complainants, December 12, 1884.

Present for the complainants: Paul Bakewell, Esq.; for the defendant, James A. Beattie.

GEORGE S. MYERS, being sworn, doth depose and says in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the complainant, as follows, viz:

1 Q. State your name, age, residence, and occupation.

A. My name is George S. Myers; I am 52 years of age; reside in St. Louis, and am a tobacconist.

2 Q. You are a member of the corporation complainants in this suit, are you not?

A. I am a stockholder, vice-president, and treasurer.

3 Q. Do you know Lewis N. Senour, who lives, or did live, in the neighborhood of Covington, Kenton county, Ky.?

A. I know Mr. Senour; I knew he was in business in Covington, but I don't know where he lived exactly, whether in Covington or not.

4 Q. Did you know him in the year 1878?
A. Yes, sir.
5 Q. About the fall of 1878?
A. Yes, sir.
6 Q. What was his business then?
A. They were manufacturing tobacco—Senour & Noonan.
6 Q. Did you have any dispute with him or with the firm of which he is a member concerning the right of his firm or of himself to use a star mark for plug tobacco?
A. Yes, sir.
7 Q. Do you remember about when that was?
A. That was in the fall of 1878, September or October, I can't tell exactly which.
96 8 Q. What was done in that matter and what was the dispute about?
A. Well, Messrs. Senour & Noonan were using a star on their tobacco, which came in conflict with our star brand, and I went over there to make them quit it.
9 Q. What kind of a star was it they were using at that time on their tobacco which you noticed?
A. I don't know as I can describe the star exactly. It has been some time since I saw it, but we considered it a near enough imitation to our star brand to come in conflict with it.
10 Q. Was it a mark on the tobacco?
A. Yes, sir.
11 Q. Do you remember the material of which the star was made?
A. I think it was made of paper.
12 Q. Did you come to any agreement with Mr. Noonan or Mr. Senour, of the firm of Senour & Noonan, at that time, in reference to the use of this star?
A. Yes, sir.
13 Q. What was the understanding or agreement?
A. Well, I went there for the purpose either of coming to an agreement, getting him to abandon it or bringing suit against him. When I went there I took with me Mr. M. I. Barker, a friend of mine, and I went into Messrs. Senour & Noonan's office and had a conversation with them. I told him (Mr. Senour) that we considered that they were using the star in conflict with our established brand and that we wanted them to quit it, and after talking some time he agreed to quit it, provided we would pay for the expense he had been at in getting up the tools to make his brand, and to save a lawsuit and to save trouble I agreed to do it. After the agreement was made he asked me if there was any objection to their using the brand on the outside of the boxes, and I told him there was; that we considered it a conflict, and that I wanted all or nothing, and he agreed then to abandon the whole thing.
14 Q. Speaking of this dispute, and in reference to the settlement of the question, Mr. Senour, being examined for the defendants, said: "We compromised with them on the terms that they would pay the expense of the dies for cutting the tags, and that we
97 were to have the privilege of using any other shape tag that

we saw proper, with the word 'star' on the tag." Now, was that the agreement?

A. It was not, sir. We have no control over any other shape of tag except our own brand, and the word "star" was expressly understood as not to be used.

15 Q. Did you authorize Mr. Senour, or the firm of which he was a member, to use the word "star" on plug tobacco in any way?

A. I did not.

16 Q. Did you authorize Mr. Senour or the firm of Senour & Noonan to use any kind of a star, in any way, as a distinguishing mark for plug tobacco?

A. I did not, sir, and he agreed for himself and his firm to discontinue the use of a star in any manner or form.

17 Q. In the cross-examination of Mr. Senour these questions were asked of him and these answers given: "I now show you a plug of tobacco with a tin tag on it, and a figure that looks like a five-leaf clover marked 'red star,' and I ask you what that is on that tobacco?

A. That is what we brand as our red star tobacco at present.

Q. That is the mark that you agreed with the Liggett & Myers Tobacco Company to use in place of the star-shaped tag?

A. Yes, sir."

Now, I ask you whether you agreed to let Mr. Senour, of the firm of Senour & Noonan, use as a mark on plug tobacco a tag shaped like a five-leaf clover, of any color—either red or any other color—with the word "star" or "red star" on that tag?

A. I certainly did not, sir?

18 Q. At that time did Mr. Senour show you any tag or a tag of that description—that is to say, a tag shaped like a five-leaf clover, with the words "red star" or the word "star" on it, and ask you whether he could use that?

A. No, sir; no such tag as that was shown at all nor spoken of that I have any remembrance.

19 Q. Do you remember about the time when this agreement was made between your concern and Mr. Senour?

A. It was either in September or October, 1878; I don't know which; I don't remember the exact time.

98 20 Q. Did your concern pay Mr. Senour for his expense in getting up these marks according to his own figures and according to your agreement?

A. Yes, sir.

In answer to cross-interrogatories proposed to him by JAMES A. BEATTIE, Esq., counsel for the defendant, the witness doth depose and say as follows, viz:

1 X Q. Mr. Myers, the marks that Senour and Noonan were using were pieces of paper cut out in the shape of five-pointed stars, one of them in red and the other in blue, were they not?

A. I don't remember; it has been some time and I don't remember the shape; they were stars and they were cut out of paper, but I don't remember the color of them.

2 X Q. They were paper stars?

A. They were paper stars.

3 X Q. Were they pressed into the plug or how were they attached to the plug; do you remember?

A. I am not sure, but I believe they were pasted.

4 X Q. Don't you remember that it was rather thick paper that they were cut out of and that they were pressed into the plug?

A. It might have been so.

5 X Q. Have you ever seen this five-leaf clover mark with the words "Red Star" on it which Senour & Noonan have since adopted?

A. I have, sir.

6 X Q. When did you first see that?

A. I don't remember.

7 X Q. Can you give somewhere about the time when you first saw it?

A. Well, it must have been in the early part of 1879 or it might have been earlier than that.

8 X Q. Have you seen it frequently?

A. No; I have not seen it very frequently.

9 X Q. But you have seen it since then?

A. Yes; I am the manufacturing man and not in the trade, and I never see the tobacco that is brought into the factory; I have seen samples of it in the factory to show that it was an infringement for them to use what they were using, but I am not in the
99 trade at all and do not know and do not see what is in the trade.

10 X Q. You have seen that mark, though?

A. I have seen that mark brought in or sent in by our men to show us what they were using.

12 X Q. Have you ever objected to Senour & Noonan's use of that mark?

A. I think we have, sir.

12 X Q. Then I understand the extent of the claim of the complainants with reference to the emblem of a star in connection with plug tobacco is that they claim not only the device or emblem of a star—a tin star on the tobacco—but that they claim the use of the word "star" however it may be used in connection with plug tobacco?

Complainant's counsel objected to the question as incompetent and as not growing out of the direct examination.

A. Yes, sir; we claim that everything that is calculated to lead a person to believe that anything they use is star tobacco is an infringement upon our rights.

13 X Q. Then you claim the device of a star and the word "star" on the outside of the box as a violation of your rights, do you?

Objected to by complainant's counsel.

A. We do.

14 X Q. As well as the placing of the emblem of the star in any way on the tobacco itself?

A. We certainly claim that; yes, sir.

Signature waived.

M. I. BARKER, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by PAUL BAKEWELL, Esq., counsel for the complainant, as follows, viz:

1 Q. State your name, age, residence, and occupation.

A. My name is M. I Barker; I am 46 years of age; I reside in Cincinnati; am a leaf-tobacco dealer.

100 2 Q. Do you know Lewis N. Senour, formerly of the firm of Senour & Noonan, of Covington, Kenton county, Kentucky?

A. Yes, sir.

3 Q. Were your present at the time that any agreement was made between Messrs. Senour & Noonan and Liggett & Myers or the Liggett & Myers Tobacco Co., through Mr. Myers?

A. I was.

4 Q. Do you remember about when that was?

A. I can't tell exactly the date; it was some time in the fall of 1878, and I could tell by looking.

5 Q. Do you remember what the question in reference to which the agreement was made between Liggett & Myers and Messrs. Senour & Noonan was?

A. Yes, sir.

6 Q. Please state what that was.

A. It was an agreement that they were to discontinue the use of the star brand.

7 Q. Do you remember what Senour & Noonan were using at that time which Liggett & Myers particularly complained of; what kind of mark it was?

A. No, sir; I can't tell what kind of a mark it was, but I know it was a red star; they called it a red star.

8 Q. You were present, you say, at the time this agreement was made, were you not?

A. Yes, sir.

9 Q. And George S. Myers was also present, was he not?

A. Yes, sir.

10 Q. In reference to this agreement Mr. Senour says: "We compromised with them on the terms that they would pay the expense of the dies for cutting the tags, and that we were to have the privilege of using any other shape tags we saw proper with the word 'star' on the tag." Do you remember whether at that time—at the time of the making of this agreement—it was agreed by Mr. Myers or the persons whom he represented that Mr. Senour or Messrs. Senour & Noonan could use the word "star" on the tag?

A. I remember very distinctly that he told them they couldn't use it.

101 11 Q. In the cross-examination of Mr. Senour on the part of the defendants he is asked this question: "In that controversy (referring to this controversy between Liggett & Myers and Messrs. Senour & Noonan) I understood that they did not claim that

they had the right to prohibit you from the use of this brand on the boxes" (referring to the star brand or stencil brand), and the answer to that question was this: "No, sir." Now, I ask you whether at that it was agreed by Mr. Myers, representing the Liggett & Myers Co., that Mr. Senour or Senour & Noonan could use the star stencil brand as a brand for his tobacco?

A. No, sir; he didn't agree to anything of the kind.

12 Q. Do you know whether or not he objected to that?

A. He did object to it. He wanted everything appertaining to the brand taken away or everything appertaining to the star, and Mr. Noonan himself said that they would abandon it, and it wouldn't make much difference to them.

13 Q. You being present at that agreement, and from your understanding of it, what did you understand to be the scope of that agreement?

A. I understood that they would use nothing in relation to a star of any description whatever as a mark on tobacco.

14 Q. In the examination of Mr. Senour this question was asked him by the counsel for the defendant: "We now show you a plug of tobacco with a tin tag on it and a figure that looks like a five-leaf clover and marked 'Red Star,' and I will ask you what that tobacco is," and his answer was, "That is what we brand as our 'Red Star' tobacco at present.

Q. That is the mark that you agreed with Liggett & Myers to use in place of the star-shaped tag?

A. Yes, sir."

Q. Now, I will ask you whether at that time, at the time this agreement was made, any such symbol or mark—that is to say, a symbol or mark being in the shape of a five-leaf clover of any color whatever, and marked with the words "Red Star" or the word "Star," was accepted and agreed to as a mark that Mr. Senour

102 or Senour & Noonan could use on their plug tobacco?

A. No, sir; there was nothing exhibited at all.

In answer to cross-interrogatories proposed to him by JAMES A. BEATTIE, Esq., counsel for the defendants, the witness doth depose and say as follows, viz:

1 X Q. Give the names of all the persons who were present at this interview, if you please.

A. I can't give you the names of any but the four: George S. Myers and Messrs. Noonan & Senour.

2 X Q. Were there any others that you remember?

A. Not that I remember of; there might have been.

3 X Q. Were you ever present at any but the one interview of which you have spoken, between George S. Myers and Senour & Noonan?

A. Not that I know of or remember of.

4 X Q. You don't know whether any subsequent interview took place between them or not?

A. I do not.

5 X Q. You don't know what communication passed between the complainants and Senour & Noonan by letter, do you?

A. No, sir.

6 X Q. Now, state what was the matter of which Senour & Noonan were doing, and which Mr. Myers complained of.

A. He complained that they were using a star brand that infringed on his.

7 X Q. In what shape was that star brand?

A. I said I don't know.

8 X Q. Did you see it?

A. I don't know that I did; I saw the tobacco in market.

9 X Q. How was the tobacco that you saw marked or branded?

A. I think it had a red star on the plug.

10 X Q. Was that in the shape of a star, in the shape of a red piece of paper pasted or pressed into the plug?

A. I can't state distinctly how it was.

11 X Q. It was in reference to that particular brand this interview was?

A. It was in reference to the star brand, the infringement of the brand and the word "star."

103 13 X Q. A brand would signify something in the shape of a stencil, and this was the mark on the tobacco itself, wasn't it?

A. That in connection with the star, they called it a star.

14 X Q. Wasn't it in reference to abandoning that shaped tag?

A. No, sir; it was in reference to abandoning the star in any shape.

15 X Q. I understand Mr. Myers claimed for his company that they had the exclusive word or device of a star in connection with the manufacture of tobacco, no matter in what shape it appeared?

Objected to by the complainant's counsel as incompetent and irrelevant.

A. I don't know what he claimed, except that he claimed anything that infringed on the star brand was an infringement upon him.

16 X Q. And he objected to the branding of the tags with the word or device of a star?

A. Yes, sir.

17 X Q. And he objected to the marking of the tobacco with the word or device of a star in any shape?

A. Yes, sir.

18 X Q. Do you know or remember the agreement about the use of this clover-shaped tag was a subsequent consideration between these parties; do you know anything about that?

A. I don't know anything about it; never heard of it.

19 X Q. Do you recollect whether there were any subsequent communications between them as to the brand on the outside of the boxes?

Objected to by the complainant's counsel as incompetent.

A. No, sir.

Being re-examined by PAUL BAKEWELL, Esq., counsel for the complainant, the witness answered as follows, viz:

21 Q. But your memory is very clear as to the nature
104 of the contract that was entered into, and what the parties agreed to do or not to do, and with reference to their doing it at that time, isn't it?

A. Yes, sir.

Signature waived.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, L. L. Walbridge, a notary within and for the city of St. Louis, State of Missouri, hereby certify that the foregoing depositions of George S. Myers and M. I. Barker were taken before me at the office of Paul Bakewell, Esq., No. 417 Olive street, on the 12th day of December, 1884, by consent of parties to said cause, who were respectively represented by counsel at the taking of said depositions; that it was then and there agreed by the counsel representing the parties to said cause that said depositions might be taken by me in short-hand, and that my transcript of said short-hand notes might be read in evidence on the trial of said cause with the same force and effect, to all intents and purposes, as if said transcript had been subscribed by said deponents.

I further certify that the foregoing is a true and faithful transcript of said short-hand notes so taken as aforesaid, and that I am not of counsel or attorney for either of the parties to said cause, and in no way interested in the event thereof.

In testimony whereof I have hereunto set my hand and notarial seal this 13th day of December, A. D. 1884.

[L. S.] ——— ———.

105 *Defendant's Testimony.*

The depositions of E. Holbrook, H. Wirgman, M. S. Preston, D. Musselman, H. W. Rudolf, J. G. Starr, J. Miller, C. C. Voght, L. N. Senior, John Finzer, and Rudolph Finzer, taken on the 4th day of August, 1884, at the office of Beattie & Winchester, at Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the defendant in an action between Liggett & Myers Tobacco Company, plaintiff, and R. Finzer, defendant, now pending in the United States circuit court, Kentucky district, both parties, by attorney, being present.

EDWARD HOLBROOK, being duly sworn and examined by Mr. BEATTIE, as attorney for the defendant, deposed as follows:

1 Q. State your name, age, residence, and occupation.

A. Name, Edward Holbrook; age, 53; residence, Louisville, Kentucky; occupation, tobacco manufacturer.

2 Q. How long and where have you been a tobacco manufacturer?

A. Thirty-five years—about forty years—in Louisville, Kentucky, and Quincy, Illinois.

3 Q. State whether or not you have ever known of the brand or the device of a star to be used in connection with the manufacture of plug tobacco.

Objected to by counsel for the plaintiff as incompetent, irrelevant, and immaterial as to any of the issues in this case.

106 A. Yes, sir.

4 Q. Who used it?

Same objection.

A. I did.

5 Q. When did you commence the use of it?

A. I cannot remember the exact date, but it was in 1876.

6 Q. Did you use it any time prior to to that?

Same objection.

A. I did.

7 Q. How long prior to that?

A. Ten year prior—used it as a stencil.

8 Q. Where did you use the star in connection with the tobacco—where did you put the brand?

Same objection.

A. On the boxes or caddies.

9 Q. Look at the stencil plate now shown you and say what it is.

Same objection.

A. That is the stencil of the star.

10 Q. Whose brand was that?

Same objection.

A. That belonged to me until I sold it to H. Wirgman.

11 Q. Is this the stencil plate from which you branded the boxes of which you spoke?

Same objection.

A. That is the one.

Defendant's counsel offer in evidence the stencil plate above re-referred to, and mark the same "Defendant's Exhibit, Holbrook brand."

12 Q. Examine the two sheets of paper now shown you, with a star brand on them, and state what they are.

A. That is an impression of the star stencil.

107 13 Q. An impression of this plate that you have just spoken of?

A. I did not count the dots, but I presume that it is the same. I do not seem to be able to make it fit, though.

14 Q. I will ask you whether or not those two impressions on

those two pieces of paper represent the star branded on the boxes of which you have spoken—the boxes of the tobacco manufactured by you?

A. They look similar to me; they were like these.

Counsel for the defendant offers in evidence the said two sheets of paper, marked, respectively, "Defendant's Exhibits, Holbrook, Nos. 2 and 3."

Counsel for complainant objects to these on the ground that they are irrelevant to any issue in this case.

15 Q. How extensive did you sell the tobacco, the boxes of which were marked with the stencil of a star?

A. Several thousand boxes. Several thousand pounds in a year or so.

16 Q. Did that tobacco have any name in the trade?

A. I cannot remember, it has been so long since. I have a faint recollection that this was put on the boxes. It was put on the ends of the boxes. There was also another stencil, Jenny Lind Star Tobacco.

17 Q. Was that the name it had in the trade?

A. Jenny Lind was the most prominent.

18 Q. Was or not the word "Star" used in the name at all?

A. I don't remember, it has been so long since.

19 Q. Did you have any successor in your business?

A. Yes, sir; Mr. Wirgman.

Counsel for complainant hereby notifies counsel for defendant that on or before the hearing of this cause he will move the court to strike out the testimony of this witness as incompetent and irrelevant to any issue in this case.

108 Counsel for defendant replies that he introduces this witness for the purpose of showing just where the complainant stands with reference to the use of the star in connection with plug tobacco.

H. Wirgman.

Also the deposition of H. WIRGMAN, taken at the same time and place, and in the same behalf. The said witness being first duly sworn by me, and examined by Mr. BEATTIE for the defendant, deposed as follows:

1 Q. State your name, age, residence, and occupation.

A. Name, H. Wirgman; age, 34; residence, Louisville, Kentucky; occupation, tobacco manufacturer.

2 Q. How long and where have you been a manufacturer of tobacco?

A. I was connected with Mr. Holbrook's manufactory in 1868–9; and since 1879 I have been manufacturning for myself, succeeding Mr. Holbrook.

3 Q. I will ask you whether or not you know of the use of a device or brand of a star in connection with plug tobacco in any way?

Objected to by counsel for the complainant as incompetent, irrelevant, and immaterial to any issue in this case.

A. Mr. Holbrook used it from my time there.

4 Q. How long do you recollect his using it?

A. It was in 1876 that I remember of it.

5 Q. Do you remember of it prior to that time at all?

A. No, sir.

6 Q. Look at this stencil plate, "Defendant's Exhibit, Holbrook, No. 1," and these two sheets of paper with the device of a star on them marked "Defendant's Exhibits, Nos. 2 and 3," and state what they represent?

A. They represent the brand that was used by him.

109 7 Q. Where was the brand placed?

A. On the head of the box.

8 Q. Did that tobacco have any distinct name in the trade?

Same objection.

A. My recollection that it was on the head of the box "Union Jack," and it had a number of stars by the side of it. The "Union Jack" brand also had stars on it.

Cross-examination by Mr. BAKEWELL:

9 Cross-Q. What enables you to fix the date of that brand being placed on the boxes of tobacco in 1876?

A. During that time we branded up a number of boxes that we sent to St. Louis, and among the brands that Mr. Holbrook ran at that time was the "Jenny Lind" and "Union Jack," and this was the head brand for it. It had been used by him before that, but I don't remember how long or the times.

10 Cross-Q. You are sure that it was in 1876?

A. Yes, sir; it was on the boxes at that time.

11 Cross-Q. This tobacco was sold as "Union Jack," was it not—"Union Jack" was the name of the brand, was it not?

A. Yes, sir.

12 Cross-Q. How long was that use continued?

A. I don't remember, sir. I think, though, that it was for some while after that; it was sold in the Philadelphia trade.

13 Cross-Q. For how many years?

A. Probably up to the time that he gave up the factory; I don't remember.

14 Cross-Q. When did he give up the factory?

A. Along in 1879.

110 15 Cross-Q. That mark has not been continued since then on the tobacco manufactured at the factory?

A. I don't remember whether I have used "Union Jack" since then or not.

16 Cross-Q. You are not using it now?

A. No, sir.

17 Cross-Q. You are not using these stencils now before you, filed with the testimony of Mr. Holbrook, are you?

A. No, sir.

18 Cross-Q. On any tobacco?
A. No, sir.
19 Cross-Q. And you have not on any tobacco?
A. No, sir.
20 Cross-Q. And you have you not since 1879?
A. No, sir.

Redirect examination by Mr. BEATTIE:

21 Q. Who is the owner of that brand now?
A. I am, sir.
22 Q. Do you claim the right to use it if you wish to?
A. Certainly, sir.

M. S. Preston.

Also the deposition of M. S. PRESTON, taken at the same time and place and in the same behalf. The said witness, being first duly sworn by me and examined by Mr. BEATTIE for the defendant, deposed as follows:

1 Q. State you name, age, residence, and occupation.
A. Name, M. S. Preston; age, 34; residence, Louisville, Ky.; occupation, tobacco foreman and superintendent.
2 Q. In whose employment are you?
A. I am in Mr. Wirgman's now.
111 3 Q. How long have you been in his employment and connected with the factory that he runs?
A. I have been in his employment ever since he has been in the business himself. I have been in the factory ever since 1868.
4 Q. Who was the proprietor of the factory prior to his becoming the proprietor of it?
A. Edward Holbrook.
5 Q. Do you know anything about the use of a device or brand of a star in connection with plug tobacco?

Objected to by counsel for the complainant as incompetent, irrelevant, and immaterial.

A. Yes, sir; I know that that brand has been used; we have used it; I have put it on myself.
6 Q. Where was the brand put?
A. On the head of the box.
7 Q. How long was that done?
A. I cannot remember how long it has been done; I remember that it was done very extensively in the year I mentioned, 1876.
8 Q. Do you recollect its use prior to that time at all?
A. I don't remember distinctly; I suppose it was used, but I don't remember.
9 Q. What enables you to say that it was in 1876?
A. Because I used it a great deal at that time myself.
10 Q. Examine the three exhibits now shown you, marked "Defendant's Exhibits, Holbrook, Nos. 1, 2, and 3," being a stencil-

plate, and two sheets of paper with the device of a star on them, and say what those exhibits represent?

Same objection.

A. They represent a star.

11 Q. What star?

Same objection.

A. A star that is used in the factory.

112 12 Q. Does it or not represent the star about which you have been testifying?

Same objection.

A. Yes, sir.

13 Q. Do you recollect that star having been branded on the boxes?

A. Yes, sir; as a head brand. It has been some time since I saw it. We have used the brand "Union Jack" with this brand. We have used it since Mr. Wirgman has had the business himself. That tobacco was sold in Philadelphia.

14 Q. What did that brand consist of?

A. "Union Jack" was the name.

15 Q. Did it have any other device?

A. It had stars on the side of the boxes.

16 Q. How many stars?

A. I never counted them to see how many there were.

17 Q. What kind of stars were they; what shape or what number of points did they have?

A. I never counted the points in the star.

Cross-examination by Mr. BAKEWELL:

18 Cross-Q. What is your business at present?

A. Superintendent of the tobacco works.

19 Cross-Q. Whose?

A. H. Wirgman & Co.'s.

20 Cross-Q. That is your employment at present?

A. Yes, sir.

21 Cross-Q. What was your occupation in 1876?

A. I was employed there at that time as a hand.

22 Cross-Q. You were a hand at that time?

A. Yes, sir.

113 23 Cross-Q. You say that in 1876 tobacco branded with the mark shown in "Defendant's Exhibits, Nos. 1, 2, and 3," now before you, that that brand was placed on boxes of plug tobacco?

A. Yes, sir.

24 Cross-Q. And shipped to Philadelphia?

A. Yes, sir.

25 Cross-Q. Do you know to whom that tobacco was shipped?

A. I don't remember now, distinctly, the names.

26 Cross-Q. You cannot remember the name of any one?

A. I have not got the names of any one at that time. I don't remember.

27 Cross-Q. What was the brand of tobacco called?

A. Union Jack; it was called that when I used it.

H. WIRGMAN, recalled:

H. Wirgman, being recalled by the defendant, being examined by Mr. BEATTIE, deposed as follows:

1 Q. You spoke of Union Jack tobacco branded with a star as having been sold in Philadelphia in 1876. Do you remember the names of any of the purchasers?

A. It was sold through our agents, Woodward, Curd & Co.

2 Q. Do you recollect their location in Philadelphia?

A. I did remember where they were, but I cannot think of it now; I have the address at the factory.

3 Q. Are they still in business there?

A. No, sir; Woodward is an agent, tobacco agent.

4 Q. Were they located in Philadelphia, on Front street, between Market and Arch?

A. Yes, sir; that is where they were.

5 Q. Where is Mr. Woodward's place of business there, do you know?

114 A. He is on—I have forgotten the address; I have not addressed them for some time, and I have forgotten the address.

6 Q. What is his full name?

A. Theodore H. Woodward.

7 Q. Was not his place of business on the southwest corner of Front and Arch?

A. It was there, but he is now about half a square up Arch from there; he has moved.

David Musselman.

Also the deposition of DAVID MUSSELMAN, taken at the same time and place and in the same behalf. The said witness, being duly sworn by me and examined by Mr. BEATTIE, for the defendant, deposed as follows:

1 Q. State your name, age, residence, and occupation.

A. David R. Musselman; age, 45; residence, Louisville, Ky.; occupation, tobacco manufacturer.

2 Q. How long have you been a tobacco manufacturer?

A. In Louisville, about twenty-five years.

8 Q. Do you manufacture plug tobacco?

A. Yes, sir.

4 Q. I will ask you whether or not you have ever known of a device or a brand of a star to be used in connection with the manufacture of plug tobacco in any way? And, if so, state how.

Objected to by counsel for the complainant as incompetent, irrelevant, and immaterial to any issue in this case.

A. I used it in our business; we called our factory "Star factory."
5 Q. Did you have a sign up calling it "Star factory?"

Same objection.

115 A. Yes, sir; the sign was Musselman & Co., with two stars at the end of the word factory.
6 Q. Where was the factory located?
A. On Third street, between Main and the river, in Louisville, in 1859.
7 Q. How long did you have that factory with that name?
A. From 1859 to 1876.
8 Q. Did you ever have a star brand of tobacco?

Same objection.

A. Yes, sir; we had one, but I don't exactly recollect it now.
9 Q. You have just a general recollection of such a brand?
A. Yes, sir.
10 Q. About what time did you have it?
A. Along about 1860.
11 Q. Did you use the device of a star in connection with the tobacco in any way?
A. Not while we had that factory; only the factory name.
12 Q. I speak of this star brand.
A. That I cannot say.
13 Q. You don't recollect the particular details of that?
A. No, sir.

Cross-examination by Mr. BAKEWELL:

14 Cross-Q. What is your business?
A. Tobacco manufacturer.
15 Cross-Q. In Louisville?
A. Yes, sir.
16 Cross-Q. When was it that you had a star or the mark of a star on your factory?
A. That was in 1859.
17 Cross-Q. How long did it continue there?
A. Until 1876.
116 18 Cross-Q. Between that time—between 1859 and 1876—did you have any tobacco marked with the mark of a star upon it—upon the plug of tobacco?
A. Not on the plug; no, sir.
19 Cross-Q. When did you discontinue to have the mark of a star on your factory?
A. In 1876.
20 Cross-Q. You have not had the mark of a star on your factory since 1876?
A. No, sir.
21 Cross-Q. You spoke in your direct examination of the brand of a star. When did you begin to use the brand of a star?
A. That brand was in the family, and was used along about—before the war—about 1858, and along up to 1863–'4.

22 Cross-Q. It was discontinued after 1863–'4?
A. Yes, sir.
23 Cross-Q. And never used afterward?
A. I don't know that it was.
24 Cross-Q. It is not used now?
A. Not in my factory; no, sir.
25 Cross-Q. What was this tobacco called that you had branded with this brand of a star?
A. I don't just recollect the name of it.
26 Cross-Q. Do you know whether it was called "Star Tobacco?"
A. No, sir; I don't think it was.
27 Cross-Q. Was there anything else besides the brand of a star upon it?
A. I cannot say now that I recollect of anything.
28 Cross-Q. But you say that has been discontinued since 1866?
A. Yes, sir; 1866 or 1864; along in there; I don't recollect seeing it since 1864–'6—along in there.
117 29 Cross-Q. Your tobacco was never sold, to your knowledge, as star tobacco because you had marked a star on your factory?
A. No, sir.

Redirect examination by Mr. BEATTIE:

30 Q. Why did you cease to call your factory the "Star" factory?
A. Well, we just changed the name.
31 Q. Have you the same factory now?
A. No, sir.
32 Q. When did you move from that factory?
A. We moved from there in 1875, in December.
33 Q. Did you have any successor in the old factory?
A. No, sir.
34 Q. You just changed the location of your factory?
A. Yes, sir; and called it a new name.
35 Q. What was the firm when you called it the "Star" factory?
A. Musselman & Co.
36 Q. You went out of the firm?
A. Yes, sir; not out of the Star factory firm, I didn't, not when it was called the Star factory.
37 Q. You went out subsequently?
A. Yes, sir.

H. W. Rudolf.

Also the deposition of H. W. RUDOLF, taken at the same time and place and in the same behalf. The said witness, being duly sworn and examined by Mr. BEATTIE, deposed as follows:

1 Q. State your name, age, residence, and occupation.
A. Name, H. W. Rudolf; age, 53; residence, Louisville, Ky.; occupation, glass stainer and sign painter.
118 2 Q. How long and where have you carried on the business of a sign painter?

A. I have carried on the business of glass staining and sign painting in 1870, '71, '72 and until the spring of 1873, on Third street, between Main and the river.

3 Q. I will ask you whether or not you are acquainted with the firm of John Finzer & Bros., of Louisville?

A. Yes, sir.

4 Q. What is their business?

A. Tobacco manufacturers.

5 Q. Did you ever do any work for them?

A. Yes, sir.

6 Q. What sort of work did you do for them?

A. Glass signs.

7 Q. Examine the glass sign now shown you and state if you recognize that sign.

Objected to by counsel for the complainant because immaterial, irrelevant, and incompetent.

A. Yes, sir; I recognize that.

8 Q. Who made that sign?

Same objection.

A. I did.

9 Q. Who did you make it for?

Same objection.

A. For John Finzer & Bros.

10 Q. What year did you make it in?

Same objection.

A. In the spring of 1873.

11 Q. What enables you to say that it was in the spring of 1873?

Same objection.

A. It was one of the first pieces of work that I done. It was just before I quit the work down on Third street.

12 Q. How many of those signs did you make for him?

119 A. I made six at a time.

13 Q. How many did you make altogether?

A. I made about twenty-five of that pattern.

14 Q. Did you make any of any other pattern?

A. I made some with other designs; there were some larger and some smaller.

15 Q. What device did the others have?

A. They had different ornaments; there is one that I remember that had a star on it.

16 Q. How were those signs used?

Same objection.

A. They were used for different purposes.

Counsel for defendant thereupon offered said sign above referred to in evidence marked "Defendant's Exhibit, John Finzer & Bros., No. 1."

Counsel for complainant objects to the introduction of said sign in evidence as incompetent, irrelevant, and immaterial to any issue in this case.

Counsel for complainant declines to cross-examine the witness, and notifies counsel for defendant that on or before the hearing of this case he will move the court to strike out the testimony of this witness, together with the exhibit filed and referred to in said testimony, as incompetent, irrelevant, and immaterial.

Joseph G. Starr.

Also the deposition of Jos. G. STARR, taken at the same time and place and in the same behalf. The said witness being duly sworn, and examined by Mr. BEATTIE for the defendant, deposes as follows:

1 Q. State your name, age, residence, and occupation.

A. Name, Jos. G. Starr; age, 39; residence, in Louisville, Ky.; occupation, dealer in cigars and tobacco, wholesale and retail.

120 2 Q. How long have you been engaged in that business, and where?

A. Five years. I have just been in the house I am in now five months.

3 Q. All those five years you carried on business in the city of Louisville?

A. Yes, sir.

2 Q. Are you or not familiar with the brand of tobacco made by the complainants, Liggett & Myers, and known as "Star" tobacco?

A. Yes, sir; I have sold it ever since I have been in business.

5 Q. Look at the plug of tobacco now shown you, marked with a tin tag in the form of a star, and state what it is?

(Said tobacco was here shown to witness by counsel.)

A. That is Liggett & Myers' tobacco. I have sold lots of it.

6 Q. Are you familiar with a brand of tobacco made by the defendant, Rudolph Finzer, and marked "Starlight?"

A. Yes, sir.

7 Q. Examine the plug of tobacco now shown you, and state what it is?

(Plug of tobacco shown the witness.)

A. That is the plug—it is a plug of Finzer's "Starlight." I have sold that, too. I sell it now. I have got it in stock.

8 Q. I will ask you to examine these two plugs of tobacco, and compare them and the trade marks together, and ask you whether, from your experience as a dealer in tobacco, and from your knowledge of the marks on tobacco, whether you think that the Finzer's plug of tobacco could be sold for the Liggett & Myers' plug?

Objected to by counsel for the complainant as incompetent and irrelevant and immaterial.

A. No, sir; it could not be sold for it.

Counsel for the defendant offers in evidence the first men-
121 tioned plug, marked "Defendant's Exhibit, Liggett & Myers' plug," and also offers in evidence the second plug referred to, marked "Defendant's Exhibit, Rudolf Finzer plug."

Counsel for the complainant objects to the same, and declines to cross-examine the witness.

John Miller.

Also the deposition of JOHN MILLER, taken at the same time and place, and in the same behalf. The said witness being first duly sworn by me, and examined by Mr. BEATTIE for the defendant, deposed as follows:

1 Q. State your name, age, residence, and occupation.

A. Name, John Miller; age, 46; residence, Louisville, Ky.; occupation, cigar business, and handling tobacco generally.

2 Q. You are a retailer of tobacco?

A. Yes, sir.

6 Q. How long have you been engaged in that business, and where?

A. Twenty-six years.

4 Q. Where?

A. In Louisville, Ky., on Main, between Eleventh and Twelfth, most of the time.

5 Q. Examine the two plugs of tobacco now shown you, marked "Defendant's Exhibit, Liggett & Myers' plug," and the other, "Defendant's Exhibit, Finzer plug," and state whether, from your experience as a retail dealer in plug tobacco, you think that this plug marked "Starlight" could be sold for the tobacco with the tin star?

Objected to by counsel for the complainant as incompetent, irrelevant, and immaterial.

A. No, sir; it could not.

6 Q. You say you do not think that one could be sold for the other?

122 Same objection.

A. No, sir; it could not. I have handled those goods ever since they have come to the market—that is, this tobacco marked with a tin star. If a man comes into my place and calls for star he gets this tobacco, Liggett & Myers', and if he wants Finzer's goods he has got to call for "Starlight." I have a box of that tobacco around to my house that I bought six months ago, and I really have not sold a plug of it yet. The man, if he wants Finzer's goods, he has got to call for "Starlight."

7 Q. Do you sell more of Liggett & Myers' tobacco than you do of any other sort?

A. Yes, sir.

Counsel for the complainant declines to cross-examine the witness.

Chas. C. Voght.

Also the deposition of CHAS. C. VOGHT, taken at the same time and place, and in the same behalf. The said witness, being first duly sworn by me, and examined by Mr. BEATTIE for the defendant, deposes as follows:

1 Q. State your name, age, residence, and occupation.

A. Name, C. C. Voght; age, 34; residence, Louisville, Ky.; occupation, manager for John Finzer & Bros.

2 Q. How long have you been employed with John Finzer & Bros.?

A. Eleven years.

3 Q. What is their business?

A. Tobacco manufacturers.

4 Q. Where have they carried on business, and how long?

A. Louisville, Ky.

5 Q. How long, to your knowledge?

A. To my knowledge, since 1866.

123 6 Q. Were you ever the book-keeper for the firm?

A. Yes, sir.

7 Q. When were you their book-keeper?

A. From the time that I went with them, in 1873, until 1878.

8 Q. Have you ever known the brand or device of a star to be used in connection with plug tobacco?

A. Yes, sir.

9 Q. What brands have you known—what particular brands?

A. We had two brands; we had one "Silver Star," and another "Five Brothers' Star of the West."

10 Q. How was the brand "Silver Star" connected with the manufacture of plug tobacco? How was it shown in connection with it?

A. It was branded on the packages containing the tobacco.

11 Q. Branded on the boxes or caddies?

A. Yes, sir.

12 Q. Was there one star, or a number of stars?

A. The words were on the boxes, and then there were five stars. That is my recollection.

13 Q. Why did they adopt five stars?

A. I could not say.

14 Q. Were there five brothers members of the firm?

A. Yes, sir.

15 Q. Give their names.

A. John, Ben., Fred., Rudy, and Nick.

16 Q. When was that "Silver Star" used? When did you make it and sell it?

A. "Silver Star" was in use when I went with them, and we used it up to some time in 1877.

17 Q. Fix the earliest time when you know, yourself, that they used it?

A. In 1873.

124 18 Q. Have you any memorandum showing use about that time?

A. Yes, sir.

19 Q. Refer to that, if you please.

A. I have not for 1873; I have for 1875. Here it is.

20 Q. What book is that you have before you?

Objected to by counsel for the complainant as incompetent, irrelevant, and immaterial.

A. John Finzer & Brothers' sales book.

21 Q. For what time?

Same objection.

A. January, 1875, to January, 1877.

22 Q. What memoranda do you find in that book in regard to the "Silver Star?"

A. I find on page 6, under date of January 27, 1875, bill to Sitz & Johnson, of Springfield, Ohio, ten half butts Our Jewel, 3 63, 7 64, 6 637 pounds, at 58 cents, $369.46; eight quarter butts Our Jewel, 7 37 and 1 38, 297 pounds, at 58 cents, $172.26; ten quarter butts Our Jewel, cable roll extra, 4 29, 1 41, 402 pounds, at 58 cents, $233.13; ten quarter butts "Silver Star," bright butts, 1 35, 4 36, 5 37, 364 pounds, at 59 cents, $214.86; eight caddies Our Jewel, 6's, 7 20, 1 60, at 61 cents, $97.60; total, $1,087.24.

23 Q. What has become of the sales book or books of John Finzer & Bros. prior to this book?

A. I think that I have the one prior to this. The others are destroyed.

24 Q. How were they destroyed?

A. By fire, September 9, 1880.

25 Q. Did the factory of John Finzer & Bros. burn up at that time?

A. Yes, sir.

125 26 Q. How extensive a sale of that brand of tobacco marked "Silver Star" and marked with stars on the box did you have?

A. We had a very large trade. I don't know the number of pounds, but it amounted to many hundred boxes.

27 Q. How long did they continue to manufacture it and sell it?

A. The last that was made was in 1877.

28 Q. Would they manufacture it and sell it now if it was called for?

A. I should think so.

29 Q. In regard to the "Five Brothers' Star of the West," when did they begin to manufacture that?

Objected to by counsel for the complainant as incompetent and irrelevant.

A. That we began in May, 1875.

30 Q. Have you any memoranda in regard to the sale of that tobacco?

A. Yes, sir; I have.

31 Q. State where you find it; in what book. Give the details of the memorandum to the stenographer, so that he can take it down.

A. John Finzer & Brothers' sales book, being the same book referred to above, and here present. Here is a bill, page 44, under date of May 31, 1875, Allen, Keith & Co., Chicago, Ill., ten quarter butts, Star, 10's, 10 21, 210 pounds, at 62 cents, $130.20.

32 Q. Now, I will ask you how the device of the star was connected with the tobacco in the case of the "Five Brothers' Star of the West."

A. It was a plug of tobacco just wrapped in a foil or wrapper. On one side of it was in print "Five Brothers' Star of the West" and a large star.

33 Q. Examine the six pieces of tin-foil now shown you and state what they are.

126 A. That was the wrapper for the goods sold under that brand. The plug of tobacco was wrapped with this.

34 Q. Did you use that at the date of the memorandum that you have just read?

A. Yes, sir.

35 Q. How extensive a sale had that tobacco—plugs wrapped with wrappers of that kind?

A. We sold a great deal of it; I cannot say exactly how much.

36 Q. How long did you continue the manufacture of it?

A. I think during that year.

37 Q. Not afterward?

A. I think not.

38 Q. Would they manufacture it now if called for?

Objected to as incompetent, immaterial, and irrelevant.

A. I should think so; yes, sir.

39 Q. I will now exhibit to you two plugs of tobacco done up in tin-foil and ask you whether that is the style in which the "Five Brothers' Star of the West" was done up.

A. Yes, sir.

Counsel for the defendant offers in evidence one of the said sheets of tin-foil, marked "Defendant's Exhibit John Finzer Bros. No. 2," and one of the said plugs of tobacco, marked "John Finzer Bros. No. 3."

40 Q. State whether or not this wrapper with this device, "Five Brothers" and a five-pointed star and the words "Star of the West," 10's—what was the object of wrapping each plug in a wrapper like that?

Same objection.

A. We did it, I presume, for two reasons; first to save the wrapper on the goods and next as a trade mark.

41 Q. Something to identify the goods and their origin?
A. Yes, sir.

42 Q. I will ask you whether or not the firm of John
127 Finzer & Bros. had used the device of a five-pointed star on their bill-heads and letter-heads.

Objected to for the same reasons.

A. Yes, sir.
43 Q. How long have they been using that?

Same objection.

A. Since 1876.
44 Q. Has or not the firm made a five-pointed star their especial trade mark for a long time past?

Objected to as leading and incompetent.

A. Yes, sir.
45 Q. How did that device originate, or did it have any connection with the number of the firm?

Same objection.

A. Yes, sir; there were five brothers of them. The trade mark that they use on their stationery I drew myself.
46 Q. Were they in the habit of giving the names of the five brothers on this device in any way?
A. Yes, sir.
47 Q. State how they did that.

Objected to for the same reasons.

A. They had a star with a figure five between two of the points and the initials of the brothers between each point. I had one with the brothers' names—John, Ben., Fred., Nick, and Rudolph.

Cross-examination by Mr. BAKEWELL:

48 Cross-Q. You are the brother-in-law of the defendant in this suit?
A. Yes, sir.
49 Cross-Q. What is your present occupation?
A. Manager for John Finger & Bros.
50 Cross-Q. Has John Finzer & Bros. a separate place of manufacture from Rudolph Finzer, the defendant in this suit?
128 A. They have.

By Mr. BEATTIE:

51 Q. In whose handwriting are the entries that you have read from the sales book of John Finzer & Bros.?
A. They were made by Mr. Hunter Barksdale, who was my assistant book-keeper at that time.

By Mr. BAKEWELL:

52 Cross-Q. How long have you been in the employment of John Finzer & Bros.?

A. Eleven years.

53 Cross-Q. Who were you with before that?

A. I was with Dorn, Barkhouse & Co. and Julius Dorn & Co.

54 Cross-Q. What was your business prior to being employed by John Finzer & Bros.?

A. Book-keeper.

55 Cross-Q. For a tobacco house?

A. No, sir.

56 Cross-Q. Were you connected with any tobacco factory or any tobacco concern prior to being employed by John Finzer & Bros.?

A. I was in business about a year myself and handled some plug tobacco.

57 Cross-Q. What year was that?

A. About two years before I went with them.

58 Cross-Q. With whom?

A. John Finzer & Bros.

59 Cross-Q. What year did you go with John Finzer & Bros.?

A. 1873.

60 Cross-Q. You spoke in your direct examination of a brand of tobacco called Silver Star. Was that the name of the tobacco?

A. Yes, sir.

61 Cross-Q. Who manufactured that tobacco?

129 A. John Finzer & Bros.

62 Cross-Q. How was that tobacco branded or marked?

A. It was marked on the boxes and caddies with the words "Silver Star," and above that were the five stars in red and blue ink.

63 Cross-Q. That was on the box and caddy?

A. Yes, sir.

64 Cross-Q. In what year did they commence marking their boxes and caddies with this mark?

A. I don't know when they commenced; they were using it when I went with them in 1873.

65 Cross Q. Are you sure of that?

A. I am.

66 Cross-Q. How long did they continue using it after 1873?

A. Some time in 1877.

67 Cross-Q. Can you state positively what year they discontinued the use of that "Silver Star?"

A. I can refer to this book and tell you.

68 Cross-Q. Without reference to the book, can you give the exact date when they discontinued the use of "Silver Star?"

A. I know it was in 1877.

69 Cross-Q. They have not used it since, have they?

A. No, sir.

70 Cross-Q. In your direct examination you spoke of tobacco manufactured by John Finzer & Bros. marked "Star of the West." When did they commence the manufacture of the tobacco called "Star of the West?"

A. In May, 1875.

71 Cross-Q. What enables you to fix that date of May, 1875?

A. I have seen it on the book there.

72 Cross-Q. How long did they continue making that tobacco and marking it in that way?

130 A. During that year.

73 Cross-Q. During the year 1875?

A. Yes, sir; about a year.

74 Cross-Q. They discontinued making that along about a year after May, 1875?

A. Yes, sir.

75 Cross-Q. And have not used it since?

A. No, sir.

76 Cross-Q. You spoke in your direct examination of their having used a five-pointed star with the first names of the five brothers on the ends of those points. What star was that?

A. That is our trade mark on our stationery.

77 Cross-Q. How long have they used it?

A. Since 1876.

78 —. Where have they used it?

A. On the stationery of all kinds—letter-heads and bill-heads.

79 Cross-Q. You have used that continuously?

A. Yes, sir.

80 Cross-Q. Do you use it now?

A. Yes, sir.

81 Cross-Q. On all your letter-heads?

A. Yes, sir.

82 Cross-Q. That is a five-pointed star with the first names of the five brothers on the ends?

A. Yes, sir.

83 Cross-Q. But you have not marked that star on your tobacco nor marked it on any of your boxes, have you?

A. No, sir.

84 Cross-Q. When you say that that is your trade mark do you mean to say that that is your trade mark for your tobacco?

A. I mean to say that that is our general trade mark.

131 85 Cross-Q. What do you mean by a trade mark.

A. We use it on all our stationery, as I have stated before.

86 Cross-Q. Does it indicate your goods?

A. It does not indicate our goods; no, sir.

By Mr. BEATTIE:

87 Q. What do you call your factory?

A. Five Brothers' Tobacco Works.

Question and answer objected to by counsel for the complainant.

Lewis N. Senior.

Also the deposition of LEWIS N. SENIOR, taken at the same time and place and in the same behalf. The said witness, being duly sworn by me and examined by Mr. BEATTIE, for defendant, deposed as follows:

1 Q. State your name, age, residence, and occupation.

A. Name, Lewis N. Senior; age, 57; residence, in Kenton county, five miles from Covington, Ky.; occupation, tobacco manufacturer.

2 Q. How long and where have you manufactured tobacco?

A. About twenty-five years, I suppose; I don't recollect exactly; in Covington, Kentucky.

3 Q. Did you ever know of a device of a star being used in connection with plug tobacco in any way?

A. Yes, sir.

4 Q. What have you known about that?

A. Do you mean as a tag on plug tobacco?

5 Q. Connected with it in any way.

A. The brand has been used; star brands have been used ever since I recollect on tobacco—the star shape and the word star.

6 Q. Used where; where was the brand put?

A. On the outside of the box—stencil brands.

7 Q. Have you ever used such a symbol yourself on boxes of tobacco?

132 A. Yes, sir.

8 Q. How long have you used them?

A. I know since 1878, and I think a little earlier than that; I could not find any bills or anything to show that we had used it before that time.

9 Q. Examine the two stencil plates now shown you and say what they are.

A. They are what we brand the outside of the boxes with; that is what I would call a brand that goes on each package of tobacco.

10 Q. Did you use that as early as 1878?

A. Yes, sir.

11 Q. Did you use it earlier?

A. I could not say positively that we did.

12 Q. Are you using it yet?

A. Yes, sir; we use the same stencil brand, but the monogram is different; the firm is changed, and have a different monogram.

13 Q. You refer to the monogram in the star?

A. Yes, sir; with the exception of that, it is the same.

Counsel for the defendant offers in evidence the said stencil plates, marked "Defendant's Exhibits Senior Nos. 1 and 2," respectively.

Objected to as incompetent, irrelevant, and immaterial.

14 Q. Did you ever mark your tobacco, each plug, with a tag in in the shape of a star?

A. Yes, sir.

15 Q. Did you ever have any controversy with Liggett & Myers about that?

Objected to by counsel for the complainant as incompetent, irrelevant, and immaterial.

A. Yes, sir.

16. What did they claim in that controversy?

Same objection.

133 A. They claimed that they had used the star shape before we had—that is, as a tag on the plug.

17 Q. Did they object to your use of these brands on the outside of the box?

Same objection.

A. No, sir.

Counsel for the complainant objects to the above testimony as incompetent and irrelevant, the record being the best evidence as to what Liggett & Myers did.

18 Q. What did they first call their tobacco that is marked with this star?

A. I don't know what they first called it, but at the time that we were using the brand they called it "New Style," branded on each box.

19 Q. Do you know their bills; have you seen any of their bills?

Same objection.

A. I suppose that I have.

20 Q. Examine the bills now shown you and state whether or not you recognize those as their bills.

Same objection.

A. Yes, sir; they are their bills; they run into 1878; after they called it the "New Style" I think they called it "Silver Star" for awhile.

Counsel for the defendant offers such bills in evidence, marked "Defendant's Exhibit Liggett & Myers' Bills Nos. to 8," inclusive.

Counsel for the complainant objects to the introduction of said bills in evidence.

21 Q. In that controversy I understand that they did not claim that they had the right to prohibit you from the use of this brand on the boxes?

Same objection.

A. No, sir.

134 22 Q. What did they claim?

Same objection.

A. They claimed that they had the right of the star shape; it didn't make any difference whether in tin or on paper.

23 Q. That they had the right to the star shape on what?

A. As a tag on plug tobacco.

24 Q. Were you at that time putting star-shaped tags on your tobacco?

Same objection.

A. Yes, sir.

25 Q. Have you any of those tags with you?

A. Yes, sir.

26 Q. Look at the red and blue stars which I show you now and state what they represent.

A. They are paper tags intended to go on plug tobacco.

27 Q. Are these some of your tags that you used on each plug of your tobacco?

A. Yes, sir.

28 Q. As I understand you, Liggett & Myers objected to your using those sort of tags—that shape?

A. Yes, sir.

29 Q. How did you compromise?

A. We compromised with them on the terms that they would pay the expense of the dies for cutting the tags, and we were to have the privilege of using any other shaped tags that we saw proper, or the word star on the tag.

30 Q. Have you any of those plugs with you on which you used the new tags?

A. Yes, sir.

Counsel for defendant offers in evidence a sheet of paper with red and blue stars on it, marked "Defendant's Exhibit Senior Nos. 3 and 4."

Counsel for the complainant objects to the same as incompetent, irrelevant, and immaterial.

135 31 Q. Did you name your tobacco from the color of these stars, "Red Star" and "Blue Star?"

A. Yes, sir.

32. Q. I now show you a plug of tobacco with a tin tag on it and a figure that looks like a five-leaf clover, marked "Red Star," and ask you what tobacco that is.

A. That is what we brand as our "Red-Star" tobacco at present.

33 Q. That is the mark that you agreed with Liggett & Myers to use in the place of the star-shaped tag?

A. Yes, sir.

34 Q. Do you use the same tag for your Blue-Star tobacco?

A. No sir; not a tin tag.

35 Q. Do you still make the Blue-Star tobacco?

A. No, sir; we have not made any of it for some time.

Counsel for the defendant offers in evidence said plug of tobacco, marked "Defendant's Exhibit Senior Plug."

Counsel for the complainant objects to the same for the same reasons stated heretofore.

36 Q. State whether or not it was agreed, as a part of this compromise, that you could continue the use of the brand such as you have shown on the caddies and boxes?

Same objection.

A. Yes, sir.

37 Q. Did they claim that they had used that brand prior to you?

Same objection.

A. No, sir.

38 Q. What did they say?

Same objection.

A. Mr. Myers admitted that they had not.

Counsel for the complainant objects to so much of the last answer of the witness as purports to state what Mr. Myers said or did.

136 39 Q. Did Mr. Myers represent the complainant, the Liggett & Myers Tobacco Company, in that negotiation with you?

A. Yes, sir.

Cross-examination by Mr. BAKEWELL:

40 Cross-Q. When did you commence marking your plugs of tobacco with a red and blue star, as shown in the defendant's exhibits on this sheet of paper?

A. As early as 1878.

41 Cross-Q. You commenced marking them with those stars in 1878?

A. Yes, sir.

42 Cross-Q. Did the Liggett & Myers Tobacco Company bring any suit against you?

A. No, sir.

43 Cross-Q. They notified you to stop using the star, didn't they?

A. No, sir; I don't know that they notified us.

44 Cross-Q. You had some discussion with them about it?

A. Yes, sir; Mr. Myers came to our place himself and we agreed on that.

45 Cross-Q. How long after you had been using this star did he come?

A. I don't remember.

46 Cross-Q. Can you come at all near it?

A. It was more than a year afterward, I think.

47 Cross-Q. Mr. Myers called to see you, and the result of that discussion was that you stopped using it—you discarded the use of the red and blue star or any other star on your plug tobacco and you commenced from that time the use of a mark like "Defendant's Exhibit Senior Plug?"

A. Yes, sir.

137 48 Cross-Q. You commenced using the star brand which is shown in the stencils in evidence before you about 1877, did you?

A. Yes, sir.

49 Cross-Q. When did you discontinue the use of those star brands?

A. I have not discontinued them at all.

50 Cross-Q. You are still using the star brands, are you?

A. Yes, sir.

By Mr. BEATTIE:

51 Q. Are you still using this tag that is shown in "Defendant's Exhibit Senior Plug"—the red star?

A. Yes, sir.

John Finzer.

Also the deposition of JOHN FINZER, taken at the same time and place and in the same behalf. The said witness, being duly sworn by me and examined by Mr. BEATTIE, for the defendant, deposed as follows:

1 Q. State your name, age, residence, and occupation.

A. Name, John Finzer; age, 46; residence, Louisville, Ky.; occupation, tobacco manufacturer.

2 Q. How long have you been engaged in the manufacture of tobacco, and where?

A. Since 1862—August, 1862, in Louisville, Ky.

3 Q. What was the name of your first firm?

A. Robert & Finzer.

4 Q. Was there any change made in the firm after that?

A. Yes, sir; there was a change made about 1866, I think.

5 Q. What was the name of the new firm?

A. John Finzer & Bros., and the name of the factory was "Five Brothers' Tobacco Works."

6 Q. Who were the members of the new firm?

A. John Finzer, Ben. Finzer, Fred. Finzer, Rudolph Finzer, and Nicholas Finzer.

138 7 Q. Is that the Rudolph Finzer who is the defendant in this suit?

A. Yes. sir.

8 Q. Have you ever known of the device of a star to be used in connection with plug tobacco?

Objected to by counsel for the complainant as immaterial, irrelevant, and incompetent under any issue in this case.

A. Yes, sir.

9 Q. State the instances that you have known of its use?

A. I have known of a star that we used on foil put on plug tobacco, called the "Western Star," I think. I am not certain, but something of that kind.

Counsel for the complainant objects to the latter part of the above answer as irresponsive.

10 Q. When did you commence the use of this device, do you recollect?

A. I could not give the exact dates, but I think our books will show exactly. (The witness here examines the sales book referred to by one of the previous witnesses.) About the year 1875—the early part of 1875.

11. Q. Examine the exhibit marked "John Finzer & Bros. No. 3" and state what it is.

A. That is an exact *fac-simile* of what we made, the "Five Brothers' Star of the West."

Objected to by counsel for the complainant for the reasons stated heretofore.

12 Q. This plug with the tin-foil wrapped around it, marked "Five Brothers' Star of the West," is a plug like that which you made in 1875?

Objected to for the same reasons.

A. Yes, sir.

13 Q. Was each plug of tobacco that you made wrapped up in that way, in tin-foil, with those letters and the device of a star on it?

139 A. Yes, sir.

14 Q. How extensively did you manufacture and sell that tobacco?

A. I don't remember, although I was superintendent of the press-room at that time. It seems to me that we made a good many goods of that class for awhile.

15 Q. How long did you continue its manufacture?

A. That is something that I could not tell. It was a good smart while, though.

16 Q. Did you manufacture any other tobacco distinguished by the device of a star, about that time, or before?

A. I made some trials with a star in the plug with an indentation, but that was simply to see whether I could put the star on the goods by impressing it.

17 Q. I am not asking with reference particularly to a star on the plug itself, but any tobacco that you called Star.

Objected to for the same reasons.

A. Yes, sir; we made a "Silver Star" that we sold to a firm by the name of Sites & Johnson, of Springfield, Ohio.

18 Q. When did you make that?

Objected to for the same reasons.

A. I expect that it was probably in 1873–'4–'5; I am not certain.

19 Q. Where was that brand? Was it on the plug or on the box?

Objected to for the same reasons.

A. On the box.

20 Q. It was put on the box to give a name to the tobacco?

Objected to for the same reasons.

A. Yes, sir; there was a star put on the box, and the words "Silver Star."

21 Q. Do you remember whether there was more than one star on the box or not?

140 A. I made the brand myself at the time out of paper. There may have been five stars on it, for that was my hobby

at all times. I don't know whether that was continued or not. I cannot tell. I think that in the start I had five stars on the brand, and that I made the brand myself.

22 Q. You called your factory the "Five Brothers' Tobacco Works," from the fact that there were five brothers partners in the firm?

A. Yes, sir.

23 Q. Did you ever adopt from that circumstance a star in any way connected with your business?

Objected to for the reasons heretofore stated.

A. Yes, sir; the first instance of the kind was probably in 1866–'7. It may have been earlier, but I think it was in 1866–'7. We made a spun roll and we made a brand with five stars on it. I made the brand myself. The brand was twenty-two inches long, and, of course, thirteen inches wide, with five stars on it in a large star, and in the large star in the center was my name, and around the four other stars we had Rudy, Fred., Nick, and Ben.

24 Q. "Spun roll," what is that?

A. It is a piece of tobacco made in a coil like a rope.

25 Q. This brand that you speak of, with five stars and the name of each brother on a star, was branded on the box, was it?

A. Yes, sir; it was called "Jackson Spun Roll."

26 Q. Did you afterward adopt a single star, distinguished by the names of the brothers; and, if so, how were the names put on?

Objected to for the reasons heretofore stated.

A. Yes, sir; we adopted a star for our letter-heads and bill-heads.

27 Q. How were the brothers' names put on the star?

Same objection.

141 A. There was a name in each point. It was a five-pointed star, and a name in each point.

28 Q. Were there any letters or figures between the points?

Same objection.

A. Yes, sir.

29 Q. What were they?

A. "Five" and "Bros."

30 Q. Look at this glass sign now before you, marked "Defendant's Exhibit John Finzer & Bros. No. 1," and say whether or not you recognize that.

A. Yes, sir; I do.

Same objection.

31 Q. Is that a sign that your firm, John Finzer & Bros., had made?

A. Yes, sir.

32 Q. Do you recollect about what time it was made?

Same objection.

A. I don't remember; it may have been in 1873 or 1872, or may be earlier than that.

33 Q. How many of them did you have made?

A. I could not tell you.

34 Q. What did you do with the signs that you had made?

Same objection.

A. We sent them out to our customers—to different parties.

35 Q. Why did you adopt a star with a figure 5 in it?

Same objection.

A. Because there were five brothers, and I thought a five-pointed star would be a good emblem for us.

36 Q. If you had orders for that "Five Brothers' Star of the West" and "Silver Star," state whether you would make them now.

Same objection.

142 A. Yes, sir; we would make them, most assuredly. We make any thing we can make.

Cross-examination by Mr. BAKEWELL:

37 Cross-Q. Are you in business for yourself or have you business relations with your brother, Rudolph Finzer?

A. I am in business; my brother Nick and myself constitute the firm and brother Fred's heirs. It is a corporate institution.

38 Cross-Q. In your testimony on your direct examination you spoke of selling some tobacco that was branded Star, in 1875. What tobacco was that?

A. I think it was that "Star of the West."

39 Cross-Q. Do you know that it was the "Star of the West?"

A. Our books will show. That is all I know.

40 Cross-Q. When you say 1875 do you mean that you sold some of that "Star of the West" then?

A. I think so.

41 Cross-Q. I am not asking you what you think. Do you know that in 1875 you sold some of that "Star of the West," such as is shown in Exhibit John Finzer & Bros. No. 3?

A. Yes, sir.

42 Cross-Q. When did you first commence making and selling that?

A. It may have been a year and a half or two years that we made it.

43 Cross-Q. I asked you when you commenced making and selling this tobacco?

A. About 1875.

44 Cross-Q. How long did you continue it?

143 A. I could not tell positively; it may have been a year and a half or two years. We continued to make it regularly and sell it, but we made it as we received orders for the goods. It may have been later than that; I don't know.

45 Cross-Q. Can you come within six months of it either way?

A. No, I could not, unless I could go through the books.

46 Cross-Q. You don't make it now?

A. We are not making it now that I know of.

47 Cross-Q. You have not made any for the last five or six years, have you?

A. No, sir; I don't think so.

48 Cross-Q. In other words, you have discontinued the use of the tobacco marked like Defendant's Exhibit John Finzer & Bros. No. 3?

A. No, sir; we don't discontinue anything, so far as that is concerned; we make anything that we have made; we continue to make it whenever we receive orders.

49 Cross-Q. What do you mean by continuing to make it; you have not continued to make it since you abandoned it?

A. I don't claim to have abandoned it.

50 Cross-Q. I ask you, as a matter of fact, whether you have made this tobacco continuously since 1877?

A. I don't know whether we have since 1877. I know that we have not made any of it in the last five or six years.

51 Cross-Q. You have not made any at all?

A. No, sir.

52 Cross-Q. In your direct examination you spoke of some tobacco called "Silver Star." When did you commence making that?

A. It may have been 1872, '73, '74, or '75; I don't remember the dates.

53 Cross-Q. You are not certain as to the dates?

A. No, sir; but I know that we made it during those years. I don't remember how long we made it.

144 54 Cross-Q. Do you know that you made it in 1872?

A. I don't know unless I go to the books for it.

55 Cross-Q. When did you stop making that?

A. I don't know how long it has been. I don't know how long it has been since we have made any of those goods. I don't take any particular notice of anything of the kind, and have not for some years.

56 Cross-Q. How was that marked?

A. It was marked with a brand similar to this stencil—with a red star. There were three or four stars on it.

57 Cross-Q. It was a stencil?

A. Yes, sir.

58 Cross-Q. And marked on the box?

A. Yes, sir.

59 Cross-Q. You have not made any of that for the last nine years, have you?

A. I think we have; I am not certain. I would have to refer to the books.

60 Cross-Q. Have you made any of that since 1876, to the best of your recollection?

A. I don't know; I can go to the books and see.

61 Cross-Q. Have you made any of that for the last five or six years?

A. I don't know that.

62 Cross-Q. Have you made it continuously for the last five or six years?

A. I don't know that.

63 Cross-Q. Then if you are not able to state that, how are you able to state that you did make it between 1872 and 1875?

A. It is just as I told you a few minutes ago, that I don't pay but very little attention to that part of the business. I can go to the books and give the time.

64 Cross-Q. When you testified on your direct examination that you made it in 1872, '3, and '74, was that testimony from your recollection, or from an examination of the books?

145

A. That was from recollection, because I helped to handle the goods myself.

65 Cross-Q. During those years?

A. Yes, sir.

66 Cross-Q. And after that you did not?

A. It has been some time since I have done anything of the kind. It has been some time since I have done any branding myself.

67 Cross-Q. When did you stop doing any branding yourself?

A. I could not give you the date on that.

68 Cross-Q. But you know that between 1872, '3, and '4 you were doing some branding?

A. I would not say positively 1872 or 1873. It may have been 1872, '3, '4, and '75, and it may have run up to 1880; I don't know.

69 Cross-Q. What may have run up to 1880?

A. This branding of tobacco of that sort.

70 Cross-Q. From your knowledge, did it run up to 1880?

A. No, sir; not from my knowledge. I could not say unless I referred to the books.

71 Cross-Q. Have you the books here in this office?

A. I have one of the books here.

72 Cross-Q. Have you the book which would show whether you were making it in 1874–'5?

A. I don't know whether I have or not. I don't know whether that book commences far enough back.

73 Cross-Q. Then examine the book and tell me from the book when you commenced to use "Silver Star."

A. That is something I could not do. I cannot tell when we commenced. I know that we were on Third street when we commenced using it.

74 Cross-Q. Have you examined the books, and can you tell from your examination of the books when you started to manufacture?

146

A. No, sir; we have not got the book here. We have not got a book old enough. I think we have books at home that will show further back than that. I am not certain about that, but I think so. I think that we have books that will show that we manufactured it later than that.

75 Cross-Q. You say that you think that you have books that

will show that you manufactured it later than that; how late do you mean?

A. Running to 1878, and it may be running into 1880.

76 Cross-Q. I am not asking what they may show; I am asking as to the fact what you did.

A. I don't know; I cannot tell; the books are not here. I cannot tell unless I refer to the books, and the books are not here.

77 Cross-Q. What is your recollection about this now; from any data that you have or from any examination that you have made, what is your recollection as to the time that you discontinued the use of that "Silver Star" brand?

A. I could not give any statement at all in regard to that—what time we quit using it. We have never quit using it, because if Sitz & Johnson would send us an order to-day for "Silver Star" we would make it.

78 Cross-Q. As a tobacco manufacturer, do you mean to say that you have kept up the "Silver Star" in the last five years?

A. I could not answer that even; as a tobacco manufacturer, I say that we never discontinue the use of a brand. I may not have made any of that tobacco for ten years, but the brand is not discontinued.

79 Cross-Q. I ask you now whether or not you state, as a
147 tobacco manufacturer in Louisville, that you have been making that tobacco and selling it in the last five years?

A. We have probably made "Silver Star" tobacco, but not put the "Silver Star" brand on it.

80 Cross-Q. Have you put the "Silver Star" brand on any tobacco within the last five years?

A. That is something that I don't know. I don't know the date when Sitz & Johnson sent in their last order to "Silver Star" goods. I would have to look at the dates to get at that.

81 Cross-Q. Who are these people that you speak of as sending for Silver Star, Sitz & Johnson?

A. It was Sitz & Johnson. It is Johnson & Sons now.

82 Cross-Q. They were some persons that always ordered the same tobacco from you?

A. Yes, sir; that one particular brand was a private brand. We made it up for them.

83 Cross-Q. What were their names?

A. Sitz & Johnson.

84 Cross-Q. What are the names now?

A. Johnson & Sons.

85 Cross-Q. Where do they reside?

A. Springfield, Ohio.

86 Cross-Q. Is it your opinion that within the last five years you have sold any of this Silver Star tobacco to Johnson & Sons, or Sitz and Johnson?

A. I cannot tell whether we have sold any of that. I don't think we did in the last six years.

87 Cross-Q. That was a special brand gotten up for them?

A. Yes, sir; gotten up for them.

88 Cross-Q. What was this Jackson Spun Roll—how was that marked?

A. It was marked with a brand called "Jackson Spun Roll"
148 with five stars in the brand. I cut the brand out of pasteboard myself, and put five stars on it, and one star in the center. It formed a square with a large star in the center.

89 Cross-Q. When did you commence making that?

A. I think we commenced in 1863 on that. I didn't make the Jackson brand until we all went into partnership.

90 Cross-Q. When was that?

A. That was in 1866, I think.

91 Cross-Q. When did you commence marking it with this device of a star?

A. That was probably in 1866.

92 Cross-Q. Was that a stencil?

A. Yes, sir.

93 Cross-Q. When did you stop marking your boxes of tobacco with that brand?

A. I don't know that. I know that I carried the brand up to the new factory from Third street and we had it saved there as a souvenir.

94 Cross-Q. You mean that you kept it as a thing that you were not using?

A. We were using it at that time.

95 Cross-Q. You have not used it since?

A. No, sir; because it was burned up.

96 Cross-Q. You have not used that kind of a brand since?

A. No; I have not used the Jackson brand since.

97 Cross-Q. What year was that that you moved your factory?

A. January, 1874. We raised steam about that time.

98 Cross-Q. When did your factory burn?

A. The factory burned in September, 1880.

99 Cross-Q. You didn't use it from the time that you brought it to the factory, did you—to the new factory?

149 A. No; I don't think we did. I am not certain about that. I don't think we made any spun roll at the new factory.

100 Cross-Q. You have been asked concerning your mark on your bill-heads, which, as I understand it, consists of a five-pointed star, with the names of the five Finzer brothers in the points of the star?

A. Yes, sir.

101 Cross-Q. That is the mark on your bill-heads?

A. Yes, sir.

102 Cross-Q. When did you commence marking that on your bill-heads?

A. I don't know what year we began to use that, but it was pretty early, it seems to me, in our career.

103 Cross-Q. After you moved to the new factory?

A. I don't know that.

104 Cross-Q. Do you still continue to use that?

A. Yes, sir.

105 Cross-Q. That is only a mark on you bill-heads, though?

A. It is a mark on our bill-heads, and marked trade-mark.

106 Cross-Q. Is it marked trade-mark?

A. Yes, sir.

107 Cross-Q. Was it marked trade-mark the first time you put it on the bill-heads?

A. Yes, sir; and was copyrighted.

108 Cross-Q. But it has never been put on the tobacco?

A. No, sir.

109 Cross-Q. Nor marked on the boxes of tobacco?

A. No; I don't think it has.

110 Cross-Q. You spoke in your direct examination of having impressed at one time, by way of experiment, the mark of a star on a plug of tobacco?

A. I said that that was my recollection—that I tried something of that kind.

150 111 Cross-Q. When was that?

A. I cannot remember just exactly when it was.

112 Cross-Q. Cannot you come at all near it?

A. No, sir.

113 Cross-Q. Are you sure that you did mark it, even as an experiment?

A. To the best of my recollection, I think I did.

114 Cross-Q. But it was only as an experiment?

A. Yes, sir.

115 Cross-Q. Your tobacco was never known by that mark being impressed on the tobacco?

A. Not impressed.

Redirect examination by Mr. BEATTIE:

116 Q. As to when you commenced making that "Silver Star;" will you examine the single sales book of John Finzer & Bros. that is here and state the earliest date that that book shows the sale of the "Silver Star" that has been spoken of?

A. January 27, 1875.

117 Q. Now, did you commence making "Silver Star" at your factory on Third street or at the new factory on Jacob street?

A. I think we commenced making "Silver Star" on Third street.

118 Q. When did you move your factory?

A. In January, 1874—that is, we commenced work in January, 1874.

By Mr. BAKEWELL:

119 Cross-Q. You say you commenced making tobacco of the "Silver Star" brand in 1875?

A. According to that book there; if we have any more data I don't know. I think we made it on Third Street. I am almost certain of that.

151 120 Q. What year would that make it?

A. That would make in 1873.

121 Q. You have just sworn that you made it in 1875.

A. No, sir; I didn't. I said that book showed that.

Rudolph Finzer.

Also the deposition of RUDOLPH FINZER, the defendant, taken at at the same time and place and in the same behalf. The said witness, being first duly sworn by me and examined by Mr. BEATTIE, deposed as follows:

1 Q. State your name, age, residence, and occupation.

A. Rudolph Finzer; age, 39; residence, Louisville, Ky.; occupation, tobacco manufacturer. I am the defendant in this suit.

2 Q. How long and where have you manufactured plug tobacco?

A. I have been engaged in the manufacture of plug tobacco since April, 1866.

3 Q. Had you any connection with the manufacture of tobacco prior to that time?

A. Only as an employé.

4 Q. What firm, if any, were you a member of in 1866?

A. I was a member of the firm of John Finzer & Bros. from April 1866, until July, 1881.

5 Q. You ceased to be a member in July, 1881?

A. Yes, sir.

6 Q. Have you ever known of the symbol or device of a star being used in connection with plug tobacco?

Objected to by counsel for the complainant for the reason heretofore stated.

A. Yes, sir.

7 Q. State in what instances you have known it.

A. The first instance I ever knew of a single plug being
152 marked—each plug being identified by a star—was the "Five Brothers' Star of the West."

8 Q. When did you first know that?

A. I knew that in 1875.

9 Q. Examine the Defendant's Exhibit "John Finzer & Bros. No. 3" and state what that is.

A. That is a *fac-simile* of the "Five Brothers' Star of the West," and was manufactured by John Finzer & Bros. in 1875.

10 Q. Each plug of the tobacco had a wrapper like that wrapped around it?

A. Yes, sir.

11 Q. Were the words and device shown on that plug—"Five Brothers," and then the figure of a star, followed by the words "of the West," and then "10's"—there?

A. Yes, sir.

12 Q. What does that "10's" signify?

A. That signifies one-tenth of a pound.

13 Q. How extensively did you manufacture that tobacco?

A. We sold it through the West, and sold it in Chicago, St. Louis, and the Northwest generally.

14 Q. How long did you continue the manufacture of it?

A. To the best of my recollection, probably a year or a year and a half.

15 Q. Had that firm manufactured any tobacco designated by the name of "Star" prior to that time that you know of?

Objected to as incompetent, irrelevant, and immaterial.

A. Yes, sir.

16 Q. What was it called?

Same objection.

A. "Silver Star."

17 Q. When did they begin the manufacture of that?

153 A. To the best of my recollection, about 1871; certainly not later than 1872.

18 Q. Where was their factory then?

A. On Third street, No. 1315.

19 Q. How long did they continue the manufacture of that tobacco?

A. Certainly as late as 1877.

20 Q. Did they manufacture much of that tobacco?

A. A great deal of it.

21 Q. Was the plug itself marked or the boxes?

A. The boxes were marked.

22 Q. What was the brand on them?

A. A star. I will not be certain what kind of a star, but my impression is that it was a large star, and the lettering was "Silver Star" in a circle, and branded in red and blue ink.

23 Q. How many brothers were there in the firm of John Finzer & Bros.?

A. Five.

24 Q. What were their names?

A. John, Ben., Fred., Rudolph, and Nicholas.

25 Q. Did they or not adopt a star as symbolical of the number of brothers in the firm?

Same objection.

A. Yes, sir.

26 Q. Was that star altered in any way by any different device?

A. Only the "Five Bros," "5," and then "Bros." between the points of the star and the different names of the brothers.

27 Q. Was there any alteration on the points at any time?

A. Not that I remember of. Yes; I will take that back.

154 Before we got up the "Five-Brother" label we had a stencil brand of the letters, giving the names in the points of the star.

28 Q. That device of a star with the brothers' names on it, did you use it in connection with the stationery in your business in any way?

Same objection.

A. I think it has been on all the bill-heads. There was not any trade mark on the bill-heads at first, but since it became fashionable we have put it on there.

29 Q. Was it on the letter-heads also?

Same objection.

A. Yes, sir; the letter-heads and bill-heads.

30 Q. Examine the watch charm that I now show you and state to whom it belongs.

A. It belongs to me.

31 Q. When and where did you have it made?

A. The locket was purchased here and the trade mark was put on it in Wall street, New York.

32 Q. What trade mark is it?

A. The Five Brothers' Star.

33 Q. It is a five-pointed star, and between the points the figure "5" and the letters "Bros.," and on the points the names of John, Ben., Fred., Rudy, and Nick.

A. Yes, sir.

34 Q. Examine the wax impression that I now show you and state whether or not it was made by that watch charm.

Same objection.

A. Yes, sir; that is a *fac-simile* of the charm.

Counsel for defendant offers in evidence said wax impression, marked "Rudolph Finzer Charm."

To which the counsel for the complainant objects for the same reason heretofore stated.

35 Q. After you ceased to be a member of the firm of John Finzer & Bros. did you go into business for yourself?

155 A. Yes, sir.

36 Q. Did you build a factory?

A. Yes, sir.

37 Q. Whereabouts?

A. Caldwell street, above Jackson, Louisville, Ky.

38 Q. When did you open the factory and commence to manufacture?

A. I commenced to work in April, 1882.

39 Q. Did you get up any brands of tobacco to which you gave distinctive names?

A. Yes, sir.

40 Q. What were those brands?

A. "Sunlight," "Moonlight," "Starlight," and "Future."

41 Q. Examine the plug of tobacco now shown you, which is marked with a gold stripe on it and the letter "S" and the word "Sunlight," and state what it is.

Same objection.

A. That is my brand of "Sunlight."

Counsel for the defendant offers said plug in evidence, marked "Defendant's Exhibit Sunlight."

To which counsel for the complainant objects for the reasons heretofore stated.

42 Q. Examine the plug now shown you marked with a red strip and "Moonlight" and state what it is.

A. That is my "Moonlight" brand.

Counsel for the defendant offers said plug in evidence, marked "Defendant's Exhibit Moonlight."

To which counsel for the complainant objects for the reasons heretofore stated.

43 Q. Examine the plug that has been put in evidence as "Defendant's Exhibit Rudolph Finzer Plug" and state what it is.

A. That is my "Starlight."

156 44 Q. Did you get up all these brands at the same time?

A. Yes, sir.

45 Q. Have you been manufacturing them ever since?

A. Yes, sir.

46 Q. Were they marked from the start as they are now?

A. Yes, sir. I may have had different devices, but that is the one in general use.

47 Q. How about the "Rudolph Finzer Plug?"

A. That has always been the same.

48 Q. When you got up this brand of tobacco marked "Starlight," as shown by "Rudolph Finzer Plug," did you get it up with any reference to the complainant's Star tobacco?

Same objection.

A. Most assuredly not. I got them up for companion brands. We style our works the Sunlight Tobacco Works, and in getting up these brands I made them "Sunlight," "Moonlight," and "Starlight."

49 Q. You had no reference in doing that to the Liggett & Myers Star tobacco?

Same objection.

A. Most assuredly not.

50 Q. When was the charm, the impression of which you have put in evidence, made?

Same objection.

A. In 1874.

51 Q. When was the trade mark put on it?

Same objection.

A. In 1874.

52 Q. Do you know of any brands in this country called Starlight?

Same objection.

A. Yes, sir.
53 Q. Where is it made?

Same objection.

157 A. In Virginia.
54 Q. How long has it been made?

Same objection.

A. To the best of my recollection, since 1859.
55 Q. Examine the lithographic label that I now show you, with the words "Starlight for Australia" on it, and state what it is.

Same objection.

A. That is a brand used by Cameron, of Richmond, Virginia.
56 Q. Is this brand used with the Starlight tobacco of which you have spoken?
A. Yes, sir.

Counsel for the defendant offers said label in evidence, marked "Defendant's Exhibit Cameron."
To which counsel for the complainant objects for the same reasons heretofore stated.

57 Q. I will show you another label in three parts and ask you what that is.

Same objection.

A. That is a miniature label, one of them a copy of the large label and intended to be placed on a single plug.
58 Q. How was that used?
A. I never saw it used.
59 Q. How was it intended to be used?

Same objection.

A. To be put on a single plug.

Defendant's counsel offers said label in evidence, marked "Cameron No. 2."
To which the counsel for the complainant objects for the same reasons heretofore stated.

60 Q. I now show you three labels and ask you what they are.
158 A. They are copies of my Starlight, Sunlight, and Moonlight brands.
61 Q. How long have you used those?
A. We sent out the first goods in May, 1882.

Counsel for the defendant offers said label in evidence, marked "Defendant's Exhibits Rudolph Finzer Labels Nos. 1, 2, and 3.
To which counsel for the complainant objects for the same reason heretofore stated.

62 Q. Examine this that I now show you and state what it is.

Same objection.

A. That is our show-card for Sunlight.

63 Q. Does that exhibit the three styles of your tobacco?

A. Yes, sir; it carries out the original idea of the three companion brands.

Defendant's counsel offers said show-card in evidence, marked "Defendant's Exhibit Rudolph Finzer No. 4."

To which the complainant, by counsel, objects for the same reasons heretofore stated.

64 Q. Have you much acquaintance with the manufacture of tobacco in this country?

A. I have a pretty general knowledge of the manufacturing business; yes, sir.

65 Q. And of the brands used in it?

A. Yes, sir.

66 Q. Was it part of your business, when you were in the firm of John Finzzer & Bros., to travel for the firm?

A. I did all the traveling.

67 Q. Was that traveling small or extensive?

A. I traveled all over the country wherever we had trade—East, South, and West.

68 Q. Is the symbol of a star in connection with the manufacture of plug tobacco a rare or a common device?

159 Same objection.

A. It is a common device.

69 Q. Is it of late origin or old?

Same objection.

A. It is old; older than I am.

70 Q. I will ask you to examine Defendant's Exhibit "Rudolph Finzer Plug" and "Liggett & Myers Plug," and state whether or not one of those plugs could be mistaken for the other.

Same objection.

A. They certainly could not, nor do I believe a blind man could be deceived in the two plugs.

71 Q. Do you think your tobacco could be sold for Liggett & Myers' Star tobacco?

Same objection.

A. No, sir; I don't think it could be done, and it never was intended to be done.

72 Q. Have your ever known your Starlight tobacco to be sold for Liggett & Myers' Star tobacco?

Same objection.

A. No, sir.

Cross-examination by Mr. BAKEWELL:

73 Cross-Q. When did you commence marking your tobacco as shown in Defendant's Exhibit "John Finzer & Bros. No. 3?"

A. In 1875—the latter part of 1875. No; it was in the early part of 1875.

74 Cross-Q. You made that special brand for some parties in Springfield, Ohio?

A. Not the "Five Brothers' Star of the West."

75 Cross-Q. How long did you continue the manufacture of the "Five Brothers' Star of the West" as shown in the Defendant's Exhibit "John Finzer & Bros. No. 3?"

160 A. A year or a year and a half.

76 Cross-Q. You have not made any since then?

A. Not that I am aware of.

77 Cross-Q. What enables you to fix it as 1875 that you commenced?

A. I have taken occasion to inform myself by John Finzer & Bros.' books.

78 Cross-Q. So that your statement as to your making that first in 1875 is from their books?

A. From their books and from my own knowledge.

79 Cross-Q. You spoke in your direct examination in reference to a brand that you call "Silver Star" brand. When did you commence making that?

A. About 1871; certainly not later than 1872.

80 Cross-Q. That was a stencil brand?

A. Yes, sir.

81 Cross-Q. Marked on the boxes?

A. Yes, sir.

82 Cross-Q. When did you stop marking that?

A. Not later than 1877.

83 Cross-Q. So that up to 1877 you continued it?

A. Yes, sir.

84 Cross-Q. You have not made it since?

A. Not that I am aware of.

85 Cross-Q. This mark which you call your trade mark—an impression from your seal which you have put in evidence as "Rudolph Finzer Charm"—that is the same mark that you say that you have on your bill-heads, is it not?

A. I have not seen the bill-heads recently.

86 Cross-Q. How nearly does it resemble it?

A. It is a five-pointed star.

87 Cross-Q. When did you commence putting a five-pointed star on the bill-heads?

161 A. I have not got the date. Just as soon as it became fashionable to put those things on the bill-heads.

88 Cross-Q. To the best of your recollection, when did it become fashionable?

A. About the beginning of 1877. I would think that, to the best of my knowledge.

89 Cross-Q. That mark was only used on the bill-heads and stationery?

A. No, sir; the mark was used on the show-cards and used in various ways as the "Charm" is evidence, which was made in 1874.

90 Cross-Q. But you didn't mark it, as shown on the "Charm" or on the bill-heads, on your tobacco, did you?

A. Yes, sir.

91 Cross-Q. As a star alone?

A. As a star, with the names in the points or between the points, just prior to the time that we got the "Five Brothers" label.

92 Cross-Q. When was that?

A. To the best of my knowledge that was in 1869 or 1870.

93 Cross-Q. This "Five Brothers" label, how was that made?

A. I have not seen it for a good while. It has five portraits on a label the size of this.

94 Cross-Q. Where does the star figure?

A. I don't know that the star was on there.

95 Cross-Q. I have just asked you whether this star mark that you have on your bill-heads was placed upon your boxes of tobacco in any way?

A. I say, yes.

96 Cross-Q. How was it placed there?

A. With a stencil brand.

97 Cross-Q. When did you commence marking them that way?

162 A. From the time of the original "Five Brothers" brand, probably in 1876*—the latter part of 1876 or the beginning of 1877*—we used that device of a star brand with a five-pointed star similar to that glass sign; it was used in two colors on the boxes prior to the time that we got the label.

98 Cross-Q. You never marked that star on your plugs of tobacco?

A. No, sir; except in this case of the "Five Brothers' Star of the West."

99 Cross-Q. Where was that put?

A. It is shown in this exhibit here; it is an identifying mark on the plug like all the rest.

100 Cross-Q. I say it is not placed on the plug of tobacco; it is placed on the wrapper of tin-foil surrounding the tobacco?

A. Yes, sir; you have it before you.

101 Cross-Q. Did this "Five Brothers' Star of the West" that you speak of bear the same relation on this stencil brand that the star bears to the rest of the figure on this glass sign; was it in about that proportion?

A. It was a large brand, and there were different sized brands for boxes and caddies; there were some eighteen inches long and thirteen inches wide.

102 Cross-Q. How long did you continue the use of that star as a label for your boxes of tobacco?

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* This should be 1866 and 1867, and the label or brand referred to had no star, but had the portraits of the five brothers on it.

A. We continued to use it, as I have said, up to the time that we get the label.

103 Cross-Q. Which label?

A. The "Five Brothers" label that took the place of the stencil brand.

104 Cross-Q. Are you still using that "Five Brothers" label?

A. It is in use; yes, sir.

105 Cross-Q. In your direct examination you have referred
163 to Exhibit "Cameron No. 1," which bears the name Starlight of Australia; you have stated that that was used as a brand for tobacco in 1859; what enables you to say that?

A. From information from the gentleman who was foreman in the factory.

106 Cross-Q. Do you know whether that label is used now or not?

A. It is used now.

107 Cross-Q. Has it been continuously used?

A. Yes, sir; from what information I have.

108 Cross-Q. You don't know it of your own personal knowledge?

A. No, sir.

109 Cross-Q. You don't know, of your own personal knowledge, whether it is used to-day?

A. No, sir.

110 Cross-Q. You don't know, of your personal knowledge, when it was first used?

A. No, sir.

111 Cross-Q. You have stated in your direct examination that these three symbols attached together, one of which seems to be a small copy of the large label "Cameron," was intended to be placed on the plugs of tobacco. How do you know that it was intended to be placed on the plugs of tobacco?

A. It is evidently intended to be placed on the plugs.

112 Cross-Q. You don't know it?

A. No, sir.

113 Cross-Q. You never saw it affixed to any plugs?

A. No, sir.

114 Cross-Q. And you don't know that it ever was affixed to any small plugs of tobacco?

A. No, sir.

164 115 Cross-Q. Are you selling any tobacco that is branded with a star now?

A. Do you mean branded on the boxes?

116 Cross-Q. I mean branded by means of a stencil or marked with a label representing a star or stars, and which is sold as "Star" tobacco?

A. No, sir.

117 Cross-Q. Have you in the last nine years put up or sold any tobacco marked with the stencil brand of a star or marked with a label representing a star or stars, and which has been sold as "Star" tobacco?

A. Yes, sir.

118 Cross-Q. Simply as "Star" tobacco?

A. "Silver Star" tobacco.

119 Cross-Q. Not as "Star" tobacco?

A. Not that I remember of. I have a faint idea that we once made a "Lone Star." We have never made any simply "Star" tobacco.

120 Cross-Q. The "Silver Star" that you speak of, is that a brand that you used for about a year or a year and a half and then discontinued?

A. No, sir; that was a brand used from 1871 to 1877 or 1878.

121 Cross-Q. And then discontinued?

A. We do not discontinue a brand only when we are forced to discontinue it.

122 Cross-Q. As a matter of fact, you have never sold any of it?

A. Not that I am aware of; not to such an extent as to make a leader of it.

123 Cross-Q. When it was sold it was sold as "Silver Star?"

A. Yes, sir.

Redirect examination by Mr. BEATTIE:

165 124 Q. Look at Defendant's Exhibit "John Finzer & Bros. No. 1," being the glass-business sign, and state what that is.

A. That is a glass show-card or advertisement of John Finzer & Bros.

125 Q. When was it made, do you know?

A. To the best of my recollection, it was made in 1872 or 1873.

126 Q. Were there any number of them made?

A. There was quite a number; they were very expensive.

127 Q. How were they disposed of?

Same objection.

A. They were given to our best customers to hang up in their places of business as an advertisement.

128 Q. What do the figure "5" and the star in the lower corner signify?

A. It signifies or is emblematical of the five brothers in the firm.

129 Q. Was the first factory of John Finzer & Bros., on Jacob street, in Louisville, destroyed in any way?

A. Yes, sir.

130 Q. When was it destroyed?

A. September 9, 1880, by fire.

131 —. Did they lose any of their books and papers and brands?

A. We lost almost all of the old records; such records as we filed away in an old safe. Almost all the old records were destroyed.

132 Q. Who got up that "Silver Star" brand and the "Five Brothers' Star of the West?"

A. I did.

133 Q. Complainant's counsel asked you, in regard to the "Five Brothers' Star of the West," whether the star is on the tobacco or on the label around the tobacco. Examine Defendant's Ex-

166 hibit "Rudolph Finzer Plug," and answer whether the star

is on the tobacco or whether it is on a piece of paper on the tobacco.

Same objection.

A. We use the term in tobacco circles on the tobacco, but I suppose that I must admit that it is on a paper and on the foil.

134 Q. Is it on the tobacco in the sense that the five-pointed tin star is on the Liggett & Myers tobacco?

A. It is in the sense of an identifying mark.

135 Q. I mean is that paper label carrying the star in the exhibit, "Rudolph Finzer Plug," affixed to the tobacco in the same manner as the tin star is affixed to the Liggett & Myers plug?

A. No, sir.

136 Q. How is that tin star fixed there?

A. That is fixed by prongs and pressed into the tobacco, and this is gummed paper and dampened and stuck onto the plug.

137 Q. This "Silver Star" brand, was it a special brand made for Sitz & Johnson? Explain that.

A. That was a factory brand—a regular brand of John Finzer & Bros. Sitz & Johnson had control of a certain territory, so far as the "Silver Star" brand was concerned.

138 Q. Did they own the brand, or did John Finzer & Bros.?

A. John Finzer & Bros. owned the brand.

139 Q. Did they sell the brand to other parties outside of the territory controlled by Sitz & Johnson?

A. Yes, sir.

Recross-examination by Mr. BAKEWELL:

140 Cross-Q. Was your brother, John Finzer, with you in business at the time that you got up this "Silver Star?"

A. Yes, sir.

167 141 Cross-Q. He has testified that it was gotten up especially for Sitz & Johnson—a special brand for them?

A. He presumes so. I don't know what he testified.

142 Cross-Q. Is it not a fact that almost all the tobacco of the "Silver Star" brand was sold by them?

A. They sold probably more than any one else, but I can name three or four parties that sold it.

143 Cross-Q. Please give the names of those parties.

A. One of them was C. D. Smith & Co., of St. Joe. I think Nave, McCord & Co.—I think they sold some; and there were others, but I don't call them to mind.

Counsel for the complainant hereby notifies counsel for the defendant that on or before the trial of this cause he will move the court to strike out the testimony of the witnesses taken in this case relating to any stencil brands or marks of a star of any kind not fixed upon the plugs of tobacco as incompetent under the issues in this case.

168 STATE OF KENTUCKY, *Jefferson County:*

I, Chas. A. Graham, a notary public, duly commissioned and qualified as such, in and for the county of Jefferson and State of Kentucky, do hereby certify:

That, in pursuance of an agreement between counsel, I was attended at offi. of Mr. Beattie, in the city of Louisville and county and State aforesaid, on the 4th day of August, A. D. 1884, and between the hours of eight o'clock a. m. and six o'clock p. m. of said day, by the various witnesses named in the caption herein, witnesses of sound mind and lawful age, and that they were by me carefully examined, cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth of their knowledge touching the action mentioned in the caption.

That their examinations were by me reduced to writing in their presence, read to them in my presence, both parties being present by attorney, the signatures of said witnesses being waived by agreement.

I have retained said depositions in my possession for the purpose of forwarding the same with my own hand to the court for which the same were taken.

I further certify that I am not of counsel or attorney for either of the parties in said depositions named, or in any way interested in the event of the said cause named in the caption.

In testimony whereof I have hereunto set my hand and seal this the 4th day of August, in the year of our Lord one thousand eight hundred and eighty-four.

[L. S.] CHAS. A. GRAHAM.
Notary Public.

169 DISTRICT OF KENTUCKY, *ss:*

I, Samuel B. Crail, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 168 pages contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof.

Witness my hand and the seal of said court this 6th day of August, A. D. 1885.

[Seal of the 6th Circuit Court Ky. Dis., U. S. of America.]

SAM'L B. CRAIL, *Clerk.*

460 fols., seal & c't'f., $69.35.

Endorsed on cover: Kentucky C. C. U. S. No. 298. The Liggett & Myers Tobacco Company, appellant, *vs.* Rudolph Finzer. Filed September 19, 1885.

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CLERK

IN THE

Supreme Court of the United States.

LIGGETT & MYERS TOBACCO COMPANY,

Complainant,

vs.

RUDOLPH FINZER,

Defendant.

No. ~~577~~ 298.

STATEMENT, BRIEF, POINTS AND AUTHORITIES.

PAUL BAKEWELL,
Solicitor for Complainant.

Nixon-Jones Printing Co., 210 and 212 Pine Street, St. Louis.

IN THE

Supreme Court of the United States.

LIGGETT & MYERS TOBACCO COMPANY,
Complainant,
vs.
RUDOLPH FINZER,
Defendant.

No. 5777.

This is a Bill in Equity brought by the complainant, a corporation created by and having its chief office in the State of Missouri, against a citizen of the State of Kentucky. The object of this bill is to obtain a restraining order enjoining defendant from marking and selling plug tobacco with the mark of a star on the plug itself.

The bill does not ask an accounting, nor is there any prayer for damages.

Complainant's mark and defendant's mark are engraved on page 8 of the record.

The mark of complainant has always heretofore been affixed to each plug, by making of tin, a star of five points about half an inch in diameter, with a small round opening in the centre of this star; this is sunk into, and affixed to the plug, by means of the prongs at the back of the star.

The mark of defendant is a round paper label, about three-quarters of an inch in diameter, gilded on the face with a five pointed red star between the words "trade" and "mark," and the word "Light" below the star. This mark is affixed to each plug by mucilage.

The allegations of complainant's bill are substantially as follows: —

1. That complainant, a Missouri corporation, has, for many years past, been extensively engaged in the manufacture of plug tobacco at St. Louis, Missouri, and in selling the same in Louisville, Kentucky, and throughout the United States.

2. That complainant's plug tobacco is, and for many years has been, marked with a star affixed to the plugs themselves.

3. That, by reason of complainant's care in manufacturing its plug tobacco, this tobacco has great reputation, and is in great demand, and is largely sold throughout the United States.

4. That, by reason of the peculiar distinguishing mark of a star fastened to the plug itself, this tobacco has become, and is, known throughout the United States as "Star" plug tobacco, and is thus called for by the trade and the public.

5. That complainant was the original manufacturer of plug tobacco with the figure of a star attached to the plugs, and the first to introduce the same to the public.

6. That defendant, knowing all this, is manufacturing in Louisville, plug tobacco, to which is affixed as a mark attached to each plug, a round piece of gilded paper, on which there is a red star, and under the star the word "light."

7. That this mark of defendant is calculated to mislead the trade and public, and to induce them to purchase this plug tobacco of defendant, as "star tobacco," the name by which complainant's tobacco, by reason of the peculiar mark first introduced by complainant on plug tobacco, has become known to the trade and the public.

The answer admits all the allegations of complainant's petition, except those numbered above 5 and 7.

Defendant expressly admits, and states in his answer, "that complainant's said plug tobacco, by reason of the peculiar distinguishing mark of a star fastened upon it has become known and distinguished by the trade and public as 'star' plug tobacco, so as to be named and called for by the trade and public, in purchasing plug tobacco as 'star tobacco.'"

Defendant admits and avers in his answer that complainant has the exclusive right to the mark of a star on plug tobacco actually used by complainant, and to any colorable imitations thereof; but denies that complainant has the exclusive right to use a star mark on plug tobacco.

Defendant describes complainant's mark and its use, and says that this mark is known to the trade and public as a "tin-tag" mark, and that this tin-tag star mark is generally known to the trade and public as complainant's distinguishing mark of its plug tobacco.

Defendant describes his own mark, and denies all similarity between the two; and avers good faith on his part.

The pleadings admit: 1st. That the plug tobacco of complainants "has acquired from complainant's care, skill and fidelity in the manufacture of the same, a good reputation in the trade throughout the United States, and that large quantities of the same are constantly required from the complainant to supply the regular demand for the consumption of the country." 2d. That, by reason of the mark which complainant uses on its plug tobacco, its tobacco had become known and distinguished by the trade

and public as "Star Plug Tobacco," so as to be named and called for by the trade and public in purchasing plug tobacco as "Star Tobacco."

The pleadings present for determination the following issues only:—

1. Whether complainant was the first to introduce, and whether complainant is entitled to, the distinguishing mark of a star affixed to the plugs of tobacco themselves as a trade-mark.

2. Whether complainant's right is limited to a tin star mark on the plug, and to colorable imitations of such tin star mark.

3. Whether complainant's mark is commonly known as a tin-tag mark.

4. Whether defendant's mark was calculated to deceive.

As will be seen by reference to complainant's record, complainant introduced eleven witnesses, all tobacco manufacturers of large experience, who all swear that complainant was the first to their knowledge who marked plug tobacco by putting the mark of a star upon the plugs themselves.

It further appears from the testimony of these witnesses: That the complainant corporation is the immediate successor to the business of Liggett & Myers Co., which succeeded to the firm of Liggett & Myers. That the last named firm, in the summer of 1876, began to mark their plugs of tobacco with a star mark, which star mark has been continually used by Liggett & Myers, and their successors in business, as aforesaid, on plugs of tobacco, up to the present time. That complainant now uses that mark on their plug tobacco. That they were the first manufacturers whose tobacco was marked, as to each plug, with a star mark

on the plug; and, that this tobacco, so marked, has always been known, called for and ordered as "star" tobacco.

There is no testimony whatever that tends to contradict this evidence of complainant's witnesses. That is to say, there is no evidence whatever of any mark of a star, at any time prior to its use by us, by any one, anywhere, having been affixed to plug tobacco.

The testimony introduced by defendants was that of Holbrook, Wirgmann, Preston, Musselman, Rudolf, Starr, Miller, Vogt, Senior, and John and Rudolph Finzer.

This testimony goes only to these points: —

(*a.*) Stencil brands on boxes or packages.

(*b.*) Tin foil, marked with star, and used for wrapping plugs.

(*c.*) Letter-heads and bill-heads and stationery marked with stars.

(*d.*) Signs on factories or stores, or used for display in side of retail stores.

(*e.*) Stars on charms or lockets and other trinkets.

(*f.*) Miniature labels meant to be pasted on each plug, but never actually so used.

(*g.*) Testimony as to an alleged compromise.

(*h.*) Testimony of two witnesses as to their opinions that defendant's mark was not liable to be mistaken for complainant's star mark.

This appears from the following abstract of defendant's testimony: —

(Witness) Edward Holbrook.

Direct examination speaks of using stencil brand of a star, *on boxes* or *caddies* for ten years prior to 1876; sold brand to H. Wirgmann, words "Jenny Lind," also on stencil, words "Jenny Lind" the most prominent. Does not remember whether the word star was used in the name at all.

(Witness) H. Wirgmann.

He identifies brands testified to by Holbrook; succeeded Mr. Holbrook in business, says brand was placed on head of the box; known as "Union Jack."

X Ex. Says Holbrook's brands were "Jenny Lind," and "Union Jack;" tobacco was sold as "Union Jack;" "Union Jack" name of brand; says that the brand was used probably up to the time Holbrook gave up the factory, along in 1879; Does not remember whether Union Jack has been used since; not using it now, and has not since 1879.

(Witness) M. S. Preston

In H. Wirgmann's employ; knew of brand with star which Wirgmann put on head of boxes or caddies; the name of the brand was "Union Jack;" it had stars on the side of the boxes.

(Witness) David R. Musselman

Called his factory the "Star factory;" sign was Musselman & Co.; with two stars at end of word "factory." Had that factory with sign in that way from 1859 to 1876; had a star brand of tobacco, but does not exactly recollect it; had it about 1860; did not have device of a star in connection with tobacco; remembers nothing of star brand.

X Ex. Did not have a star mark on plugs of tobacco; has not had mark of a star on his factory since 1876;

began use of a star — that is, that brand "was in the family," and was used along before the war — about 1859 along up to 1863, or 1864; it was discontinued afterwards; does not now use it. Does not think that brand was ever called "star" tobacco; to his knowledge his tobacco was never sold as star tobacco because of star mark on his factory.

(Witness) H. W. RUDOLF

Painted a glass sign for the firm of John Finzer & Bros., said sign having stars in it.

(Witness) JAS. G. STARR,

Tobacco dealer; knows complainant's "Star" tobacco; has sold it ever since he has been in business; identifies plug of same; knows Finzer's "Starlight;" has sold that, too; comparing two plugs, says Finzer's could not be sold for complainant's.

(Witness) CHAS. C. VOGHT,

Manager for John Finzer & Bros.; been employed by them for eleven years; was their book-keeper from 1873 until 1878; Finzer Bros. had two brands — one "Silver Star" and one "Five Brothers Star of the West;" "Silver Star" was a brand on the boxes or caddies containing the tobacco; in the "Silver Star" brand, the words were on the boxes and then there were five stars; there were five brothers in the firm; brand "Silver Star" in use when he went with Finzer Bros.; and they used it up to 1877; they used it in 1873; shows sales of "Silver Star" by Finzer Bros.' books in January, 1875; says Finzer Bros.' books destroyed by fire on Sept. 9, 1880; last of this stencil brand "Silver Star" tobacco made in 1877; began to put up and sell "Five Brothers' Star of the West" plug tobacco in 1875.

This was a plug of tobacco just wrapped entirely in tin foil for a wrapper; and on one side this tin foil wrapper,

and printed thereon in blue figures were the words "Five Brothers Star of the West," and a large star; shows sales of same on May 31, 1875; continued use of "Five Brothers Star of the West," during 1875, not afterwards; says plugs were put up as shown in "Five Brothers Star of the West" to save wrapper on goods and as a trade-mark; says firm of Finzer Bros. had used device of a star on their bill-heads and letter-heads since 1876.

X Ex. Brother-in-law of defendant; John Finzer & Bro. have a separate place of business from Rudolph Finzer; says the brand of "Silver Star" was manufactured by Finzer & Bros., it was marked on the boxes and caddies with the words "Silver Star," and above that were the five stars in red and blue ink; were using "Silver Star" brand in 1873; continued to use it until some time in 1877; knows that; have not used it since 1877. Says that John Finzer & Bro., commenced manufacturing "Star of the West," in 1875; continued that during 1875; discontinued "Star of the West" about a year after May, 1875.

Q. You spoke, in your direct examination, of Finzer Bros. having used a five pointed star with the first names of the five brothers on the ends of these stars, what star was that? Ans. That is our trade-mark on our stationery since 1876; but they have not marked that star on their tobacco nor on their boxes; that mark of a star does not indicate their goods.

(Witness) Louis N. Senior

Says star brands on the outside of the box — stencil brands — have been used since he can recollect; has used star brand on boxes of tobacco himself since 1878; once used a paper star on the plug, had difficulty with complainants about that; says that complainants claimed that they had the right to the star as a tag on the plug; but says that complainants did not object to his use of brands on boxes; says that his firm settled dispute on these terms: That

complainant would pay for expense of dies for cutting his tag, and his firm were to have the privilege of using any other shaped tag that they saw proper; or the word "*star*" on the plug; says that complainants at that time agreed that he could use a clover leaf "red tag" on the plug with the words "*red star*" on it; says that complainants agreed to let him continue use of stencil brands on caddies and boxes, and that they admitted that they had not used stencil brands prior to him. (The statement of this witness as to permission to use word "star," is uncorroborated, and overwhelmingly contradicted. Record, pp. 46–53.)

(Witness) JOHN FINZER.

The substance of his testimony is: Been in tobacco business since 1862; in 1866, firm of Finzer & Bros. started; commenced to make "Five Brothers Star of the West" (the kind wrapped in tin foil with the blue print of a star on the tin foil wrapper) in 1875; made "Silver star" stencil brand on the boxes in 1873–4 and 5.

In 1866–67 made a spun roll, and made a brand with five stars on it; it was called "Jackson spun roll;" adopted a single star for letter-heads, etc.; refers to glass sign.

X Ex. Sold "Star of the West," about one or two years from 1875; has not made any for last five or six years.

As to "Silver Star," says he commenced making that in 1872, 3, 4, or 5, not certain; that was a stencil brand on the boxes. Difficult to get at truth from this witness, but says he does not think he has sold any "Silver Star" brand or stencil brand tobacco in last six years. The "Jackson spun roll" was a stencil brand with a star on it, but it was called "Jackson spun roll;" that commenced about 1866; not used it since January, 1874. Speaks of star mark on bill-heads; but that mark never put on tobacco.

(Witness) RUDOLPH FINZER,

Defendant in this cause; been manufacturer of plug tobacco since 1866; was member of firm of John Finzer & Bros., from April, 1866, until July, 1881; says the first instance that he ever knew of a single plug being marked—each plug being identified by a star, was the "Five Brothers Star of the West;" that was first done in 1875; continued the manufacture of that probably a year, or a year and a half; says prior to that time, the firm had sold the stencil brand on boxes of "Silver Star," which they commenced not later than 1872; they continued the manufacture of that tobacco up to 1877; speaks of the star mark—a star with five points having the five brothers' names at points of star—as a mark used on bill-heads; speaks of watch charm which he wears with same kind of mark on it. Speaks of brands "Sun Light," "Moon Light," "Star Light," and of no intention to imitate complainant's mark—speaks of a brand made in Virginia called "Starlight of Australia," used by a man named Cameron; says *it is a* miniature *label intended to be placed on each plug of tobacco* (it is a label representing the figure of a woman standing in outline against the skies with a star lit heaven in the background); says he never saw it used; says it was intended to be used on the plug. Says, arbitrarily, symbol of a star in manufacture of tobacco a common device and an old one; says his tobacco could not be mistaken for complainant's, says he has never known his tobacco to be sold for complainant's.

X Ex. Says "Star of the West" made for about a year and a half, commencing in 1875; not made any since then; commenced making the stencil brand "Silver Star," about 1872, and stopped making that about 1877.

X Q. p. 91. But you did not mark it, the star, as shown on the charm or on the bill-heads, on your tobacco, did you? A. Yes, sir.

X Q. p. 91. As a star alone? A. As a star with the names in the points, or between the points, just prior to the time we got the five brothers label.

X Q. p. 91. That was in 1869 or 1870.

X Q. p. 91. The five brothers label has five portraits on a label; does not know that the star is on the five brothers label.

Says the same star mark as on bill-heads used as a stencil brand on boxes; commenced marking that way from time of original five brothers' brand, latter part of 1876, or early in 1877; used their device of a star as in glass sign (in which four small stars appear in extreme corners of sign); never marked that star on plugs of tobacco.

X Q. p. 92. How long did you continue the use of that star (a star on stencil brand) as a label for your boxes of tobacco?

A. We continued to use it, as I have said, up to time we got our label.

X Q. p. 92. Which label?

A. Five brothers label, which took place of stencil brand. Says five brothers label still in use. As to "Starlight of Australia," on cross-examination shows that he knows nothing of it.

X Q. p. 93. Are you selling any tobacco that is branded with a star, I mean branded by means of a stencil or marked with a label representing a star or stars, and which is sold as star tobacco? A. No, sir.

Then (p. 93) speaks of "Silver Star" brand and adds another year to the extent of its use, saying that that stencil brand was used from 1871 to 1878; when that was sold, it was sold as "Silver Star."

It further appears from this testimony that the "Silver Star" stencil brand of John Finzer & Bros., used only on their boxes, was abandoned by them; that the mark of defendants on their stationery began only at an indefinite period in 1876; and that the "Five Brothers Star of the

West," words or design on tin foil, which formed a wrapper for tobacco, was abandoned after one year's use.

Complainant, before the hearing, moved the trial court to strike out from the deposition certain marked portions of defendant's testimony, being so much of said testimony as tended to show that, before complainant adopted as a trade-mark a star affixed to plug tobacco, certain dealers in plug tobacco here and there, to a greater or less extent, and during longer or shorter periods of time, had marked the boxes or cases in which their tobacco was packed with devices in the nature of a star, by means of a stencil or otherwise, and also as to marks on factory buildings and on bill-heads or letter-heads.

The grounds of this motion were, that there is no allegation in the pleadings as to marks upon boxes or cases of tobacco; that there is no issue in the pleadings under which any of these facts would be competent.

This motion was overruled, and the court refused to strike out this testimony or any part of it.

The court, on motion of complainant, struck out the testimony of Senior from questions 16 to 51 inclusive, which had relation to an alleged compromise; and also so much of the testimony of R. Finzer as related to star marks on watch chains and lockets, and to marks intended to be used, but never used at all, and some hearsay testimony as to the use of a brand in 1859.

On final hearing, the bill was dismissed with costs.

We contend: —

1st. That, on the evidence and admissions in the case, complainant was entitled to the restraining order: and that the court erred in refusing the same and dismissing complainant's bill.

2d. That the court improperly admitted and considered

testimony as to marks of a star not upon plugs of tobacco, but upon the boxes and cases in which they were packed.

The case will be tried *de novo* in this court. When the incompetent and illegal evidence is excluded, and the facts admitted by the pleadings are considered, these, together with the testimony for complainant, entitle us to the relief asked.

COMPLAINANT'S BRIEF.

1. A., a tobacco manufacturer, has, for several years continuously, up to the present time, been putting up, and is now putting up, plug tobacco; of this tobacco each plug is marked simply with a star; by reason of this star mark the tobacco of A. has always been, and is now, known by the name of that mark, that is, as "star tobacco." Since A. has been thus marking his tobacco with a star, his tobacco has been, and is now, sold throughout the United States, and is popular and in great demand, and known and distinguished from other plug tobacco, as "Star Tobacco." Shortly before the filing of A.'s complaint, B., another tobacco manufacturer, begins to put, and is now putting, on plug tobacco, as a mark, a small circular paper attached to each plug, on which prominently appears a star, and the word "light" and in small letters the words "trade-mark." On this state of facts, A. is entitled in equity to an injunction to prevent possible injury to the good-will of his business, and A. is entitled on the case stated to his preventive remedy, though he has shown no single instance of actual deception by B.'s goods being taken for those of A.; it being enough that A. has shown that his tobacco by reason of his mark, has become known unqualifiedly by the name of that mark and that, therefore, any goods of like class which have the mark or symbol of a star distinctively upon them, no matter what other mark, word or symbol they may have, may be, and probably will be, confused in the market with the goods of A.

Perry *v.* Truefit, 6 Beav. 66;
Seixo *v.* Provezende, L. R. 1. Ch. 192;
Dixon *v.* Jackson, 5 Macpherson, 326;

Re Worthington & Co., Cox Manual of Trade-Marks, 655;
Moses *v.* Sargood & Co , Cox Manual of Trade-Marks, 636;
Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. Rep. 92;
McLean *v* Fleming, 96 U. S. 245;
Croft *v.* Day, 7 Beav. 84.

2. A trade-mark is protected upon the theory that the persons goods are, and have become, known, so as to be distinguished from the goods of another by that mark.

Carroll *v.* Ertheiler, 1 Fed. R. 688;
McLean *v.* Fleming, 96 U. S. 245.

3. No one has a right to put off his goods as those of a rival dealer, and he cannot, therefore, be allowed to use names, marks or indicia by which he may induce purchasers to believe that the goods he is selling are those of another manufacturer.

Perry *v.* Truefit, 6 Beav. 66;
Williams *v.* Johnson, 2 Bosw. 1;
Seixo *v.* Provezende, L. R. 1 Ch. 192.
Hegeman v O'Byrne, 9 Daly 264

4. It is immaterial to which of the two senses the attempt to deceive, in a case of unfair business competition, is directed. That the eye may readily detect the difference in the marks, is no ground against injunction, where the object is to protect an established name and the rival mark is likely to deceive the ear.

Browne Trade-Marks (2d ed.), § 449;
Edelsten *v.* Edelsten, 1 DeG. J. & G. 185;
Wamsutta Mills *v.* Allen, Cox Manual T. M. 660;
Dixon *v.* Jackson, 3 Scottish L. R. 188;
Re Worthington, Cox Man. Trade-Marks, 655;

Hegeman v O'Byrne, 9 Daly 264

Harrison *v.* Taylor, 11 Jur. 408;
Carroll *v.* Ertheiler, 1 Fed. Rep. 688.

5. Where the dominating character of a trade-mark is a name or mark by which the manufacturer's goods have been familiarly known to the public, another manufacturer cannot designate his goods by words or marks that will give them that name, even though he accompanies such name or mark by a different device.

McLean *v.* Fleming, 96 U. S. 245;
Carroll *v.* Ertheiler, 1 Fed. Rep. 688.
Nier v Abrahams, 82 N.Y. 519

6. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, the adoption by a rival trader of any mark that will cause his goods to bear the same name in the market, is as much a violation of the rights of the rival as the actual copy.

Browne Trade-Marks (2d ed.), § 385;
Seixo *v.* Provezende, L. R. 1 Ch. 192.

7. A similarity which would be likely to mislead an ordinary unsuspecting customer, is obnoxious to the law.

Celluloid Co. *v.* Cellonite Co., 32 Fed. Rep. 97;
Clark *v.* Clark, 25 Barb. 76;
Moses *v.* Sargood, Cox Manual of Trade-Marks, 636.

8. The physical resemblance of the two marks, is not the sole question for consideration.

Celluloid Mfg. Co. *v.* Cellonite Mfg. Co. 32 Fed. Rep. 94;
Seixo *v.* Provezende, L. R. 1 Ch. 192;
Dixon *v.* Jackson, 3 Scottish L. R. 188.
Kegeman v O'Byrne, 9 Daly 264
Nier v Abrahams, 82 NY. 519

9. Intentional discontinuance is abandonment of a trade-mark.

Cox Manual of Trade-Marks, page 337;
Browne (2d ed.), p. 534, § 690;
Blackwell *v.* Dibrell, 14 Pat. Off. Gaz. 663.

10. Where a trade-mark has been abandoned, another person may lawfully possess himself of it, unless the original proprietor has meanwhile re-adopted it.

Blackwell *v.* Dibrell, *supra;*
Cox Manual, *supra;*

11. It matters not that the trade-mark infringed was an old mark previously used and abandoned by others, provided complainant has used it continuously from the time that he adopted it, and that it has become and was, at the time defendant used it, the distinguishing mark of complainant's goods.

Blackwell *v.* Dibrell, *supra;*
Cox Manual, *supra;*

12. The question as to whether defendant's mark is likely to deceive, is not dependent on proof of actual deception.

Field *v.* Lewis, Seton (4th ed.), 237;
Filley *v.* Fasset, 44 Mo. 173.

13. Injunction will be granted where there is an infringement of the good-will of complainant's business, though defendant has acted innocently and in good faith. The *bona fides* of defendant is immaterial where there is no question of recovering damages.

Daniel Ch. Pl. & Pr. *1649;
Amoskeag Co. *v.* Spear, 2 Sandf. 599;
McLean *v.* Fleming, 96 U. S. 251.

14. Facts admitted by the pleadings cannot be called in question by the proofs.

Daniel Ch. Pl. & Pr. *836;
Lippincott *v.* Ridgway, 3 Stockt. 526;
Weider *v.* Clark, 27 Ill. 251;
Marsh *v.* Mitchell, 11 C. E. Green, 497.

15. Testimony of dealers to prove that, in their judgment, the public was not likely to be deceived by the rival mark is incompetent. This is for the court on comparison of the two marks.

Cope *v.* Evans, L. R. 18 Eq. 138;
Cook *v.* Starkweather, 13 Abb. Pr. (N. S.) 382.

ARGUMENT.

Where a manufacturer has habitually stamped his goods with a particular mark, equity will restrain a rival from using, for the same kind of goods, either this mark, or any other mark similar to this mark, and likely from such similarity to mislead, not the purchaser in gross only, but the ordinary incautious retail purchaser.

These principles are well settled, and have received the sanction of this court, and of all courts throughout the civilized world which have had to deal with unfair competition in trade. The courts of all mercantile countries, especially, the courts of equity of England and America, with great jealousy protect a manufacturer or a trader from all unlawful competition in his business.

The general principles upon which courts exercise jurisdiction in cases of trade-marks, to quote the oft-cited language of Lord Langdale in Perry *v.* Truefit (6 Beav. 66), is that, "a man is not to sell his own goods under the pretense that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use the names, marks, letters, or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

A manufacturer stamps upon each plug of his tobacco a bright white metallic star, and thereby wins for his tobacco the name of "star tobacco." A rival manufacturer, that he may trade upon the celebrity of this tobacco, pastes upon his plugs a red star. If it were here a mere question of deceiving the public by similarity of labels as to shape, form, and color, it might be material that one is paper, the other tin, one white, the other red, one a solitary star, the other

a star with the word "light" printed beneath, but, as the obvious intent and effect of the device is, by means of a trick of trade, to sell as "star tobacco" a different article from that which has acquired a reputation under that name, these dissimilarities became wholly unimportant.

Nor can it be at all material, in view of the nature of the wrong complained of in this case, that other manufacturers of tobacco may have affixed stars to their letter-heads, bills, warehouses, packing cases or wrappers. It is not pretended that, by such means such dealers ever got their tobacco known, nor even that they sought to make it known, as "star tobacco".

Complainant since the summer of 1876, by the exclusive use of a star on its plugs, no such symbol being then used in the trade, has acquired rights to the use of the symbol and the name in this connection. We are not suing for protection as the original inventors of such a mark. That others may have used and abandoned it before 1876, we might safely concede. Our use has been exclusive since that time, and by that use, it has become and is the distinguishing mark of our goods. Our star, it is true, is a *tin-tag;* but the evidence is, and the admission in defendant's answer is, and the fact is, and the ground on which we ask relief is, that we have at great expense and trouble made our tobacco known, and that it is known, by reason of this tin-tag star, not as "*tin-tag*" but as "*Star*" tobacco. The record shows that our tobacco is so known; defendant admits this; and there is no attempt to show that any other tobacco in the market has ever been thus known. The answer admits, expressly that this, by user, has become our distinctive mark. If then defendant marks his plugs of tobacco with the mark of a star upon each plug, it is for the purposes of this case immaterial that his mark of a star is dissimilar from our mark of a star, so long as it is a star mark affixed prominently to each plug.

What the infringer aimed at in the present case was evi-

dently this, to unfairly benefit his trade and injure that of complainant by taking advantage of the character and reputation which the plug tobacco of complainant had acquired as "star" tobacco. Since Perry *v.* Truefitt (6 Beav. 66), the ruling of Lord Langdale in that case has always been followed, — that one man has not a right to use a name or other mark for the purpose of attracting to himself the trade or custom that would have flowed to the person that first used, or to the person that alone was in the habit of using, that particular name or mark. In Croft *v.* Day (7 Beav. 84) decided in the following year (1843), the same distinguished Chancellor said in effect that two things were required to accomplish this sort of wrong, such general resemblance as to effect the object of deceiving the public, and also such dissimilarity as may get for the infringer the particular benefit which he desires to obtain through the general resemblance. Of this trick, the case at bar is a good example. Defendant wished at once to trade upon the reputation of the Liggett & Myer "Star tobacco," and at the same time, not to lead the purchaser back to the place where he would be furnished with the original article.

He then addresses his deception to the ear rather than to the eye, or rather, he addresses himself through the eye, to the ear. Just as if the mark had been "bouquet," one trader marking his goods with a bunch of flowers and the other stamping the word "bouquet" upon the article to be sold. The one could not possibly be mistaken for the other, if sight were to be the only guide. Yet the use by the different traders would cause confusion, and the purchaser would be misled through the ear. The case used for illustration has actually occurred; and it was conceded by counsel, and found by the Patent office, that the picture of a bouquet and the word bouquet interfered with each other when used upon the same class of goods (See Browne Trade-Marks, 2d Ed. § 449).

The learned judge of the trial court seems to have proceeded upon some theory that it was for complainant to prove actual deception, or to introduce evidence of experts

or others that in their opinion defendant's mark was calculated to mislead the public, or the wholesale dealer, or the retail dealer.

But it is not necessary nor expedient for the party likely to be injured by acts of unlawful and unfair competition, to wait to ask for a restraining order until his goods have been wholly or partially driven out of the market. To prove actual deception is always difficult, and in most cases, practically impossible; and it is well settled that evidence of experts or others as to whether or not in their judgment the competing article or mark is likely to deceive, is wholly incompetent. This is a question to be determined by the court in a proceeding in equity, upon inspection of the rival goods, packages or marks.

The doctrine applicable to this case is thus stated on page 3 of Coddington's Digest of Trade mark cases.

"In suits to restrain the use of trade-marks alleged to be simulated, the question is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade-mark, or whether the article made and sold by the defendants under the complainant's trade-mark is an article of the same quality or value. But the courts proceed upon the ground that the complainant has a valuable interest in the good will of his trade or business, and that having appropriated to himself a particular label, or sign, or trade-mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against a defendant who attempts to pirate upon the good will of the complainant's friends or customers, or the patrons of his trade or business, by sailing under his flag without his authority or consent. (1848, N. Y. Court of Appeals, Partridge *v.* Menck, 2 Barb. Ch. 101; 2 Sandf. Ch. 622; 1 How. App. Cases, 558)."

The language of Lord Cranworth in the well-known case

of Seixo *v.* Provezende (January 22d, 1866; C. L. R. 1 Ch. 192) is as follows: —

"In order to entitle a party to relief, it is by no means necessary that there should be absolute identity. What degree of resemblance is necessary is, from the nature of things, a matter incapable of definition *a priori*. All that courts of justice can do is to say that no trader can adopt a trade-mark resembling that of a rival so that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use. If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed upon it to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device."

That the deception is equally obnoxious whether it applies to the ear or the eye, or to both or either of these senses, appears not only from the language just cited, but from numerous cases, amongst which may be noted the case of Wamsutta Mills *v.* Allen, reported in Cox's Manual as case No. 660, and decided in 1878 in the Common Pleas of Pennsylvania.

Complainant alleged that it had been accustomed to attach the name "Wamsutta Mills" to cotton and muslin shirtings made by it; that its goods had become well known

as "Wamsutta" muslins; that defendant, dealer in gentleman's furnishing goods, was using the name "Wamyesta" on shirts made from muslin of an inferior quality, and advertised their shirts as made of "Wamyesta" muslin, whereas there was no such brand of muslin known. Action for injunction and account. Held, that complainant was entitled to an injunction to restrain the use by defendants of the words "Wamyesta" on shirts not made of complainant's goods.

The language of the court is pertinent in this case: —

"It must be obvious that the question is not whether experts would be deceived, but rather whether persons who buy would probably be deceived by the name which the defendants have adopted. Upon this point we are of opinion that the resemblance between the words is of a character to deceive and mislead a certain class of purchasers — those who are acquainted with the reputation of the 'Wamsutta' muslin, but who have little knowledge of the fabric itself. Such persons might readily confuse the two names and purchase the defendant's shirts for shirts made of plaintiff's muslin. 'Wamyesta' might well be mistaken by many people for 'Wamsutta,' in view of the fact that, as appears by the proofs, there is only one muslin manufactured which is known by a name resembling that which the defendants use."

The case of Dixon *v.* Jackson decided in 1867 by the Court of Session in Scotland and reported in 5 Macpherson at page 536 (3 Scottish L. R. 188), is in many respects similar to the case at bar, and we cite it at length, adopting the language of the judge as part of our argument. The case decided is, that where an iron founder has long stamped his iron by his name and a star thus, "Govan*;" a rival shall not stamp his iron "Coats*;"

"The complainers in this note of suspension and interdict were iron-masters at Govan. The respondent was an iron-master at Coats. The complainers sought to have

respondent interdicted from branding or stamping the bar iron manufactured by him with a star.

"The complainers averred that the bar iron manufactured by them was the highest class bar iron made in Scotland (Stat. 3). The said bar iron is and has for a long period of years, been distinguished from other bar iron by the trade-mark, Govan, with a star, thus: 'Govan*,' which trade-mark was impressed on each bar with a die. It is known and distinguished, both at home and abroad, from all other bar iron by the star, and, indeed, so much is this the case, that in contracts and transactions with reference to said bar iron, it is inquired for and bought and sold by the name of 'star iron.'" (Stat. 5.) "The respondent is an iron-master at Coatbridge, and manufactures bar iron. The iron so manufactured by him is of very inferior quality, and is worth in market value about 20s per ton less than the iron manufactured by the complainers, as aforesaid, and bought and sold as star iron. The respondent's iron has hitherto been invariably marked or branded simply 'Coats,' and is known in the trade and bought and sold as 'Coats' iron. It has never hitherto been marked or branded with a star or bought and sold as Coats star iron. The complainers have, however, within the last few days, ascertained that respondent has recently begun, in concert with certain of the metal brokers in Glasgow, to infringe on the complainers' trade rights, and to imitate their trade-mark of a star, by manufacturing iron at his said works at Coatbridge, and stamping or branding it with a star, thus — 'Coats*.' The complainers have further ascertained that the respondent has been selling, or attempting to sell, the iron so manufactured and branded by him as 'star iron.' Stat. 6. No other manufacturer of bar iron than the complainers, excepting the respondent, has ever marked or branded his iron with a star, and no other iron than that of the complainers has ever been known to the market, or bought and sold as star iron. The com-

plainers have acquired and possess an exclusive right to stamp their bar iron with a star. The star is the trade-mark of the complainers' iron, and has been used by them for many years to distinguish their bar iron in the market. (Stat. 10.) The said infringement is further intended, and will have the effect of misleading buyers of bar iron into the purchase of the said inferior Coat's iron, in the belief that it is the complainers' iron, and thereby, when the inferiority is discovered, so injure and damage the character of the complainers' iron, as to subject them to very serious loss, and, indeed, may exclude their iron from some markets altogether.

"The respondent averred that he marked all his iron with a brand, which prominently distinguished it from the iron of other markers, viz.: by the word 'Coats,' the name of his works. He further averred: (6.) The complainers use the sign of a star after the word 'Govan' to indicate the lowest class of their bar iron, and when the lowest or common quality of Govan bar iron is wanted, it is ordered as Govan star iron. (7.) The respondent recently got an order for a small quantity of bar iron, of the lowest quality manufactured by him, from Mr. Theodor Hertz, iron merchant in Glasgow. The quantity was twelve tons. Mr. Hertz requested the respondent, in addition to his usual distinguishing trade-mark, to add a star, so as to mark its quality, and this the respondent did, the brand appearing thus, 'Coats*,' and delivered the said quantity of iron to Mr. Hertz. The iron could not be mistaken for Govan iron of any quality, being specially marked 'Coats.' (8.) The respondent had been for some time contemplating the use of some mark to indicate the lowest quality of his iron. It is quite common for manufacturers of iron, both in Scotland, and England, to use a sign, such as a crown, a diamond, a star, a star and crescent, a horse-shoe, in conjunction with the name of the iron works; and in no case where the name of the work is used is the sign considered part of the trade-mark, nor does one manufacturer attempt to object to

another using the sign. (9.) The respondent in adopting the star, had no intention whatever of representing, nor did he ever represent his iron as the make of the complainers, and it is quite impossible for the public to be misled, or to mistake the respondent's iron for the complainers'; the brands on each being perfectly different."

"The complainers pleaded: the manufacture and branding of his iron by the respondent, in the way and manner above explained, being an illegal interference with the rights of the complainers, and to their injury and loss, they are entitled to the suspension and interdict craved.

"The respondent pleaded, *inter alia:* (1.) The complainers have no right to claim more than the word 'Govan' as their trade-mark. (3.) The complainers have no right of property in the figure of a star as a trade-mark. (4.) There being no deception or misrepresentation by the respondent, and the employment of the star not being intended or calculated to mislead, the present complaint is groundless and ought to be dismissed.

"On 14th of January, 1867, the Lord Ordinary pronounced this interlocutor: 'On caution, passes the note, but refuses the interim interdict.'" *

"The complainers reclaimed, and prayed the court to grant *interim interdict.*

"Lord Justice Clerk.—I am for granting the prayer of the reclaiming note. This note of suspension has been passed in order that a question of law may be tried; and the parties are quite agreed that the question to be tried is, whether the star put by William Dixon & Company on the iron manufactured by them is such a trade-mark as

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"* NOTE.— The Lord Ordinary has passed this note to try the question raised between the parties, but having regards to the terms of the complainers' price list, No. 9 of process, in which complainers' iron is entered as stamped, *not simply with a star,* but as 'Govan*' the Lord Ordinary does not think that the use on the part of the respondent of the mark 'Coats*' is, *ex facie,* so clear an adoption of a trade-mark belonging to the complainers, as to entitle them to *interim interdict.*"

can obtain the protection of the law? That is a question of some delicacy, and upon which I give no opinion. But then, while that question is being tried, we are asked to give Dixon & Company *interim* protection. That raises quite a different question. In disposing of an application for *interim interdict*, the court is bound to look to the statements and interests of both parties. Dixon & Company say that they have been in the practice for a number of years of marking their iron with a star, and that their iron is known and istinguished by the star, both at home and abroad, from all other bar iron, and that it is an object of importance to them to prevent that mark being used by other manufacturers. This, it is true, is not precisely admitted by the respondent; but from the respondent's own statements, I think we may conclude that substantially it must be true. For if the star had no significance, and were of no value, the respondent could have no object in assuming it. I am, therefore, inclined to assume that it has some significance and value. Then it is said by the complainers, that no other manufacturer of iron, except the respondent ever marked or branded his iron with a star; and no other iron than that of the complainers was ever known in the market, or bought and sold as star iron. That again is not admitted, but then the respondent does not specify anybody who ever was in use to mark his iron with such a brand. All he says in answer, is what is contained in his eighth statement. 'The respondent had been for some time contemplating the use of some mark to indicate the lowest quality of his iron. It is quite common for manufacturers of iron, both in Scotland and England, to use a sign such as a crown, a star, a star and crescent, a horse-shoe in conjunction with the name of the iron works, and in no case where the name of the work is used is the sign considered part of the trade-mark, nor does one manufacturer attempt to object to another using the sign.' But when he says it is common to use a sign, such as a crown, a diamond, etc., he does not say that any

manufacturer *was in use* to mark his iron with his sign of a star, and, therefore, he has not met the complainer's broad challenge. That satisfies me that we may assume, that (1) Dixon & Company used this mark; (2) there was some significance in the mark; (3) no one else used it; and there is this important fact, that (4) the use of this mark by the respondent is recent, sudden and unexplained. I say unexplained, for what does the respondent say? He says: 'The respondent recently got an order for a small quantity of bar iron, of the lowest quality manufactured by him, from Mr. Theodore Hertz, iron merchant in Glasgow. The quantity was twelve tons. Mr. Hertz requested the respondent, in addition to his usual distinguishing trade-mark, to add a star, so as to mark its quality, and this the respondent did, the fraud appearing thus — 'Coats*,' and delivered the said quantity of iron to Mr. Hertz.' This obviously was the first time the respondent ever used the star. He tells us that it was at the request of an iron broker that he did so, but he does not tell us what his object in using it was. Now, I I think the respondent is in a very unfavorable position in a question of *interim interdict*. His proceedings look very like the device of an unfair man, to make injurious use of the trade-mark of another. I can see no injury which can arise to the respondent through granting the *interim interdict*, and I can see that a great injury may be caused to the complainers through our refusing to do so. I arrive, therefore, at the conclusion, that the true equity of the case is, that while the question is being tried, whether the trade-mark should be protected or not, *interim* protection should be granted.

"Lord Cowan had some hesitation, but did not dissent.

"Lord Benholme. — I cordially concur with your Lordship in the chair, that *interim interdict* ought to be granted in this case. For the balance of possible injury to the one party or to the other, according as we may grant or re-

fuse the *interim interdict*, appears to me to be very much on one side. Besides the considerations suggested by your Lordship, there is this one, that the main object of *interim interdict* is to keep things as they are — to prevent any alteration on the state of possession, while the legal question between the parties is being discussed and decided. Now, it is quite plain that Dixon & Company have used the star in question as a mark for a long time; while the other parties have only recently adopted it.

"Lord Neaves. — I concur in the opinion expressed by your Lordships, that *interim interdict* should be granted. The question as to the property of the trade-mark is to be tried, and upon that matter, therefore, I wish to give no opinion. The question as to granting or refusing *interim interdict* is one of discretion, depending partly on the inquiry which course is the least injurious to the parties. It is said that the Govan Company used the star mark to denote inferior iron; but there are degrees of inferiority, and any one selling cheap iron, may naturally wish it to be supposed that he sells good cheap iron, and not bad cheap iron. If the view of the respondent in using the star is to pass off his bad cheap iron as the complainer's good cheap iron, that is a probable source of injury to the complainers. Then what is the possible injury on the other side, through granting *interim interdict?* I cannot see what legal damage can arise to the respondent. It appears that he uses the star to please or satisfy Mr. Hertz, a broker, who deals with him. But it cannot be supposed that Mr. Hertz, after hearing that the court has prohibited the respondent's use of the star, will insist on having his iron so stamped, or will withdraw his custom from the respondent, on the ground of his obeying the order of the court. I am, therefore, satisfied that the proper course is to grant *interim interdict.*"

"The court pronounced the interlocutor: 'Having heard counsel on the reclaiming note for the suspenders against Lord Mure's interlocutor of January 14, 1867, recall the

said interlocutor, remit to his Lordship, of new, to pass the note, and to grant the *interim interdict* as craved."

This case goes further than we need to go, for it appears that the least part of the complainer's mark was the star, yet, because that star had given the name *star* to complainer's iron, the court thought it expedient to grant an injunction against the defendant using a star, although in main respects, the defendant's mark differed from complainer's, and, although no actual instance of deception had been shown, nor was it shown that defendant's iron had been sold as star iron.

Re Worthington & Co. was decided in 1879 by Jessel, M. R., and is reported as case 655, in Cox as follows: —

"Bass & Co., having long used, and since registered as their trade-mark on ale and beer (included in class 43), the figure of a triangle, which in practice was colored red, and from which the beer was known as 'triangle beer,' Worthington & Co. applied for the registration of a new mark to be used on beer, wine and spirits (all these articles being included in the same class, No. 43, in which Bass & Co.'s mark was registered) such new mark, consisting of a triangular device which contained a church in the center, and the words, 'Beccle's Brewery — Established 1830,' in a border."

On motion by Bass & Co. injunction granted to restrain Worthington & Co. from taking any further proceedings for the purpose of obtaining the registration for which they applied, on the ground that the marks were so similar as to render deception probable.

Another case in point is that of Moses *v.* Sargood Ewan & Co., decided in 1878 by Hall, V. C., and found reported as case No. 636, of Cox.

The plaintiffs being merchants and manufacturers of ready-made clothing, who placed on their goods a trade-mark registered in England and the colonies, consisting of one or more royal crowns, up to the number of six, the number varying according to the quality of the goods, from

which mark the goods had acquired the name of "Crown Clothing," the defendants, who alleged that they had long exported to the colonies quantities of material for clothing not made up, bearing a trade-mark consisting of an imperial crown between two standards, began to export ready-made clothing ticketed with that mark.

"On motion by the plaintiffs, injunction granted to restrain the defendants from selling or shipping ready-made clothing bearing the mark in question, or any other mark infringing the plaintiffs' rights, on the ground that, although the mark might not deceive if placed side by side with the plaintiffs' mark, it was calculated to obtain for the plaintiffs' goods the same name as that by which plaintiffs' were known, and to deceive the ordinary purchaser who had not an opportunity of comparing the marks."

Edelsten *v.* Edelsten was decided in 1863, and is reported in 1 DeG., J. & S. 185. The statement of this case in Cox at pp. 667 and 668 is accurate, and is as follows: —

The facts of the case were that the plaintiff, who was a wire manufacturer at Warrington, with a view of distinguishing his wire from that of other manufacturers, in the year 1852, adopted as a trade-mark, an anchor on the metal labels, called "tallies," which were attached to each bundle of wire sent into the market by the plaintiff 's firm. For this reason the plaintiff 's wire acquired the name of "anchor brand wire," by which it has since been generally known to the trade. It appeared that in consequence of certain wire saved from the wreck of a ship named the Versailles, having come to the hands of the plaintiff, on the tallies of which wire was an anchor surmounted by a crown, inquiries were made, which resulted in the discovery that the wire so branded had been manufactured and sold by the defendants, who carried on business as wire manufacturers at Birmingham, under the name of "*Edelsten, Williams and Edelsten.*" The plaintiff complained of the use by the defendant of the brand of a crown and an anchor as being colorable imitation of his trade-mark,

and, after considerable correspondence, filed this bill to restrain them from using such brand, and also prayed that an account might be taken of the profits made by the defendants since they had adopted it. The vice-chancellor made a decree in conformity with the prayer of the bill, which was affirmed on appeal, with costs.

The case of Carroll *v.* Ertheiler (1 Fed. Rep. 688), in which the learned district judge closely follows the doctrine of this court in McLean *v.* Fleming, was an application for preliminary injunction. The case is reported as follows: —

The bill sets forth that complainant had for over sixteen years manufactured smoking tobacco, and had adopted, and continuously and exclusively used during that time, a trade-mark, a prominent characteristic trait of which was the arbitrarily selected word-symbol "Lone Jack;" that he affixed this trade-mark by means of printed labels and wrappers to his smoking tobacco, which was put up in various styles of packages, including the form commonly known as cigarettes; that although the said word-symbol "Lone Jack" was generally used in connection with certain words, being advertisements of his name and place of business and other matter, and frequently the name of the specific article and the representation of the bust of a man smoking, still complainant's smoking tobacco came to be popularly known among merchants and consumers by the peculiar distinctive designation of "Lone Jack," and was bought and sold under that name; that respondent, intending wrongfully to usurp complainant's reputation, and to deceive the public into supposing that they were buying complainant's tobacco, colorably imitated complainant's trade-mark, and in July, 1879, began to affix to goods of substantially the same descriptive properties as complainant's the word-symbol "Lone Jack," and to sell smoking tobacco wrapped in papers and bearing a label containing, as its most prominent characteristic, *the said word-symbol*, and that the public had been deceived thereby into buying respondent's

tobacco, supposing it to have been manufactured by complainant. The bill prayed for an injunction and account.

The answer denied that complainant had any proprietary or exclusive interest in the word-symbol "Lone Jack" by itself, and alleged that complainant's trade-mark only gave him the right to use the words "Lone Jack" in connection with the words "The Celebrated" above the bust of a man smoking a pipe, and with the words on each side of said bust, "Or seek no further, for better can't be found," and below said bust the words "Smoking tobacco, manufactured by John W. Carroll, Lynchburg, Virginia." It denied that complainant had ever applied said trade-mark to cigarettes, or any other article than smoking tobacco, or that he made or sold cigarettes by the name of "Lone Jack." It alleged that what is known by smokers and to the trade as smoking tobacco is a distinct article of merchandise from cigarette tobacco, and cannot be used for the manufacture of cigarettes, and that cigarette tobacco paid a special tax to the United States Government. It further alleged that respondent had, in May, 1879, adopted and was entitled to a trade-mark for cigarettes consisting of the words "Lone Jack" above, and the word "Cigarettes" below, the figure of the jack of spades, and the name "Ertheiler & Co., New York," below, and "The best" below all; and that the sales of cigarettes under this trade-mark were the only sales by defendant complained of by plaintiff. The answer further denied that there was any resemblance between the trade-marks, or any attempt at imitation; or that respondent had any intention to usurp complainant's reputation, or deceive the public; or that the public were deceived. Both parties filed affidavits in support of the facts respectively alleged in the bill and answer.

"The defense rests upon a denial, *first*, that the defendant has used the trade-mark; and, *second*, that he has used it as a designation of "smoking tobacco." The second branch may, most conveniently, be noticed first. While the rev-

enue laws, for purposes of taxation, distinguished between smoking tobacco and cigarettes there is, we believe, no substantial difference. Cigarettes consist of smoking tobacco, similar in all material respects to that used in pipes. The circumstance that a longer "cut" than that commonly used in pipes, is most convenient for cigarettes is not important, nor that the tobacco is smoked in paper instead of pipes. It may all be used for either purpose, and is all embraced in the term "smoking tobacco."

"We do not believe the public or the trade draw such a distinction as the defendant sets up. We have not overlooked the statements contained in his affidavits, but the method pursued in obtaining this testimony, generally, does not recommend it to our confidence. The affidavits seem to have been prepared without seeing the witnesses and sent over the country to be signed by those who might be found willing to sign them. They are generally, similar in language, and printed. This method of obtaining testimony is not worthy of encouragement. If the public and trade draw such a distinction, and, therefore, do not suppose the defendant's cigarettes to be made of the plaintiff's tobacco (and the defendant so understands), why does he adopt the designation by which this tobacco is familiarly known, and persist in using it."

"The dominating characteristic of the plaintiff's trade-mark is the *name* 'Lone Jack.' His tobacco has come to be known and described by this name, throughout the country, to such an extent that the accompanying device has ceased to be important, if it ever was so, — doubtless rarely observed, and slightly remembered. At home and abroad, to the trade and the public, it is familiarly known as 'Lone Jack,' and is thus designated as the plaintiff's manufacture by purchasers and sellers.

"The defendant's application of this name to his smoking tobacco is an adoption and use of the essential part of the plaintiff's trade-mark. Surrounding it with a different device signifies nothing to the public, who attach no import-

ance to the device of the plaintiff. The defendant's name upon the cigarettes, if recognized, (and it would not be without close inspection), would not inform the public that the tobacco is not of the plaintiff's manufacture. That the defendant's act is calculated to mislead can hardly be doubted; that it has misled, the plaintiff's affidavits, we think, show; and the inference that the defendant supposed it would mislead, and intended it should, cannot well be avoided. Why, otherwise, did he adopt this particular name? He knew it to be the recognized designation of the plaintiff's tobacco, which had become popular with consumers and the trade. Did he not expect the public to be influenced thereby and his business increased? An affirmative answer can not well be avoided. If he did not, however, the injunction will do him no harm, for he has not yet had time to establish a reputation of his own under this name.

"Whether the plaintiff commenced putting up his tobacco in the form of cigarettes before the defendant applied the designation 'Lone Jack' to his cigarettes need not be considered at this time.

"The law involved is, we believe, well settled, and is so fully stated in every aspect suggested by the learned counsel for the defendant in McLane *v.* Fleming, 6 Otto, 245, and Singer Sewing Machine Co. *v.* Wilson, 3 Law Reports (Appeal Cases), 376, that no more is deemed necessary than a reference to these cases.

"A preliminary injunction as prayed for will be granted.

"An injunction was subsequently issued restraining respondent, until the further order of the court, from selling cigarettes or smoking tobacco in any form bearing the trade-mark 'Lone Jack.'"

Harrison *v.* Taylor (11 Jur. N. S. 408) was a case in which plaintiffs, by the use of the figure of an ox upon their packages of mustard, had acquired a reputation for "ox-mustard." Defendant assumed a label with an ox for his mustard. Plaintiff's label was an ox on which was printed

"Durham;" the word "Harrison" above and word "mustard" below the animal. The ox on defendant's label had no name upon it, and the word "Taylor" was substituted for "Harrison" below. Though there was evidence that customers ordered not "ox-mustard," but "Harrison's mustard," and though the court thought there had been delay, the injunction was granted on plaintiff's motion.

The authorities show that the courts have proceeded upon the theory, where goods have a name attached to them by reason of a particular mark, that the merchant whose mark has given such name to the goods is entitled to the benefit of all sales of goods of that class likely to answer that name, and that, therefore, he is not limited to the precise color or method of applying such mark, and that the court will protect him against a manufacturer who uses a like symbol or mark, although it may be of different color and may be associated with other marks or symbols, because the fact that this other manufacturer uses a like symbol or mark may result in his getting more or less of complainant's trade in goods sold by the name of that mark or symbol.

The decisions which we have cited also show how the courts have acted in cases of doubt, invariably resolving the doubt in favor of the person whose goods were known by the name of a mark, when that mark was also found, either alone or in connection with other marks, in the mark complained of, upon the theory that whereas the person might suffer who had a trade in goods bearing the name of that mark, the other person, who had no trade of his own making in goods of the name of that mark, could not suffer, and that, therefore, the doubt should be resolved in favor of the person who had a trade in the goods named after the particular symbol.

No case has been found in which it was shown that plaintiff's trade-word or symbol had given the name of that word or symbol to his goods, that the court did not

restrain a defendant from using a like word or symbol on the same class of goods, where it was shown that the defendant's use of that word or symbol was after complainant's trade in the goods of that name was established, although no actual case of deception had been shown, and although, except in respect to the symbol or word, the marks were totally different.

If this defendant is allowed to continue in the use of the star mark on his tobacco, our client will suffer in its business as a manufacturer of "Star" tobacco, and a temptation will be offered to other manufacturers to try to reap some of the harvest, which complainant has sown, by placing a star of different color, or in association with different devices, on plug tobacco.

For these reasons we submit that upon this record, complainant was, and is entitled to a decree restraining defendant from using a star on plug tobacco.

2. We do not know whether respondent will question here our right to appeal. A doubt as to this was suggested to the trial court. As to this, we say that under the act of 16th of February 1875 (18 Stat. L. 315), the law allows an appeal to the Supreme Court from final decrees of any Circuit Court, or District Court acting as a Circuit Court, in cases of equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of $5,000.

It has always been the practice since the foundation of the government, to allow the value to be shown by affidavits, where this did not appear from the record, provided the affidavit was made before final submission to the Supreme Court for its decision.

In Course *v.* Stead (4 Dallas, 22), a rule was granted to ascertain the value by affidavits in order to sustain the jurisdiction of the Supreme Court on writ of error; and at the August term, 1880, in accordance with this decision, the thirteenth rule of court was adopted (to be found in 1st Wheaton): "The plaintiff in error be at liberty to show to the satisfaction of this court that the matter in dispute exceeds

the sum or value of $2,000, exclusive of costs, this to be made to appear by affidavit and ——— days' notice to the opposite party or their counsel."

There never has been a question made as to the propriety of receiving affidavits in the Circuit Court as to value, for the purpose of ascertaining the right to appeal, where, from the nature of the case, this was not clear from the record. The question has arisen in the Supreme Court for the purpose of sustaining the jurisdiction; and the right to file the affidavits there has been always recognized, except where they were offered too late, or where an attempt was made to enhance the value stated in the pleadings or proceedings of the court below, in order to give jurisdiction.

Dean Richmond *v.* City of Milwaukee, 21 How. 391.

Where the demand is not for money and the nature of the action does not require the value of the thing demanded to be stated, the value is allowed to be given in evidence in either court.

Ex parte Bradstreet, 7 Pet. 634;
Grant *v.* McKee, 1 Pet. 248.

It has sometimes been shown by appraisement, by order of court.

U. S. *v.* Union, 4 Cranch, 416.

Or, by an admission by the parties as to the value.

Olwin *v.* Alexander, 6 Pet. 143.

We may further refer to State rel. Balt. & O. Tel. Co. *v.* Bell Telephone Co., reported in Federal Reporter for May 26, 1885, vol. 23, p. 539. There, as appears from the report of the case, the application was by the relator, a telegraph company, to compel a telephone company to permit tel-

ephonic communications between it and the relator. The judges of the Circuit Court of the United States were divided and a certificate of division was asked, to facilitate appeal, and avoid all question as to amount involved; but both the judges (Brewer and Treat) held this unnecessary, on the ground that an affidavit as to values, to be made in the Circuit Court, would settle that. Treat, J., said: "An affidavit will settle that. * * * That has been settled repeatedly. In looking for something else I have found repeated decisions on that point; but there is no dispute as to the practice. An affidavit as to values will be sufficient. * * * All you can do is to make an affidavit, and let it go with the papers, stating the amount involved is over $5,000. It involved your system. I suppose you can state that conscientiously."

So, in the case at bar, the question involved is the good will of our business, which is of immense value; the pecuniary loss to plaintiffs involved in the judicial sanction of the use of the device which we claim to be an infringement, being very much in excess of $5,000, the sum fixed by law as entitling us to an appeal.

PAUL BAKEWELL,
Solicitor for Complainant.